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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 144.

THE NORTHERN TRANSPORTATION COMPANY OF OHIO,
PLAINTIFF IN ERROR,

VS.

THE CITY OF CHICAGO.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE
NORTHERN DISTRICT OF ILLINOIS.

FILED SEPTEMBER 6, 1876.

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1 Pleas in the circuit court of the United States for the northern district of Illinois, held at the United States court-rooms in the city of Chicago, in the district aforesaid, before the judges thereof, on Tuesday, the thirteenth day of July, in the July term of said court, in the year of our Lord one thousand eight hundred and seventy-five, and of our Independence the one hundredth year.

WILLIAM H. BRADLEY,
Clerk.

THE NORTHERN TRANSPORTATION COMPANY of Ohio
vs.
THE CITY OF CHICAGO.

NORTHERN DISTRICT OF ILLINOIS, *ss:*

Be it remembered that on the first day of July, A. D. 1872, came said plaintiff, by Mess'rs Waite and Clarke, its attorneys, and filed in the office of the clerk of the circuit court of the United States for said district, at Chicago, in the district aforesaid, its præcipe for a writ of summons, and at the same time filed its bond for costs in said entitled
2 cause, which said præcipe and bond for costs are respectively in
the words and figures following, to wit:

Præcipe.

UNITED STATES OF AMERICA,
Northern District of Illinois.

Circuit court of the United States northern district of Illinois. Term A. D. 1872.

NORTHERN TRANSPORTATION COMPANY OF Ohio, plaintiff
vs. } Case.
THE CITY OF CHICAGO, DEFENDANT.

The clerk of said court will issue a summons in the above cause, directed to the marshall of said district, in plea of trespass on the case, returnable at the October term of said court, A. D. 1872, to the damage of the plaintiff of fifteen thousand dollars.

WAITE & CLARKE,
Plaintiff's Attorneys.

To W'M H. BRADLEY, Esq., *Clerk.*

(Endorsed:) Filed this 1st day of July, 1872. W'm H. Bradley, clerk.

3 *Bond for costs.*

UNITED STATES OF AMERICA,
Northern District of Illinois, ss:

Circuit court, October term, A. D. 1872.

NORTHERN TRANSPORTATION COMPANY OF Ohio
vs. } In case.
THE CITY OF CHICAGO.

We enter ourselves as security for costs in this cause, and promise to pay all costs which may accrue to the opposite party in this action, or to any of the officers of this court, and in default of payment by the plaintiff of any costs ordered or adjudged to be paid by it we hereby agree and stipulate that execution may issue against our property for any costs taxed against it. Dated this first day of July, A. D. 1872.

WAITE & CLARKE.

(Endorsed :) Filed July 1st, A. D. 1872. W'm H. Bradley, clerk.

And on the same day, to wit, the 1st day of July, A. D. 1872, a writ of summons issued out of said clerk's office against said defendant, in said entitled cause, which said writ, together with the return of the marshal endorsed thereon, is in the words and figures following, to wit:

Writ of summons.

Circuit court of the United States of America, northern district of Illinois, ss.

4 The United States of America to the marshal of the northern district of Illinois, greeting:

We command you to summon the city of Chicago, if found in your district, to be and appear before our judges of our circuit court of the United States for the northern district of Illinois, on the first day of the next term thereof, to be holden at Chicago, in the district aforesaid, on the first Monday of October next, to answer unto Northern Transportation Company of Ohio of a plea of trespass on the case, to its damage, as it alleges, of fifteen thousand dollars, and have you then and there this writ.

Witness the Hon. Salmon P. Chase, Chief Justice of the Supreme Court of the United States of America, at Chicago aforesaid, this first day of July, in the year of our Lord one thousand eight hundred and seventy-two, and of our Independence the 96th year.

[SEAL.] W'M H. BRADLEY, *Clerk.*

I served the within summons upon the city of Chicago, therein named, by delivering a true copy thereof to Joseph Medill, the mayor of said city, and by delivering a true copy thereof to A. H. Burley, the comptroller of said city of Chicago, on the 1st day of July, A. D. 1872.

B. H. CAMPBELL,
U. S. Marshal,
By S. H. TOURTELLOTTE, *Dep'y.*

5 (Endorsed:) Filed July 1st, A. D. 1872. W'm H. Bradley, clerk.

Afterwards, to wit, on the 6th day of November, A. D. 1872, said plaintiff by its attorneys filed in said clerk's office its declaration in said entitled cause, which said declaration is in the words and figures following, to wit:

Declaration.

UNITED STATES OF AMERICA,
Northern District of Illinois, ss:

In the circuit court of the United States for said northern district of Illinois, of the October term, A. D. 1872.

The Northern Transportation Company of Ohio, plaintiff in this suit, by Waite & Clarke, its attorneys, complains of the city of Chicago, defendant in this suit, and who has been summoned to answer unto the plaintiff in a plea of trespass on the case:

1ST COUNT.—For that whereas the said plaintiff at the time of the commencement of this suit was, and now is, a corporation and incorporated body created and organized under and by virtue of the laws of the State of Ohio, and not elsewhere, and was at said time, and now is, a citizen of said State of Ohio, and not elsewhere; and that the said defendant was at said time of the bringing of said suit, and now is, a municipal corporation created, organized, and established under and by
virtue of the laws of the State of Illinois and not elsewhere, and
6 at said time was and now is a citizen of the said State of Illinois,
and located and established in said northern district of Illinois,
and not elsewhere, and upon whom process in this suit has been legally served in said district and not elsewhere. And the plaintiff further alleges that before and at the time of the committing of the grievances by the said defendant as hereinafter next mentioned, was and from thence hitherto has been and still is lawfully possessed of a certain lot, piece, or parcel of ground, and the dock thereunto belonging, with the appurtenances, situated on the north side of the Chicago River, between La Salle and Wells streets in said city of Chicago, in the county of Cook, and State of Illinois, and in said northern district of Illinois, and that by reason thereof the said plaintiff during all of said time ought to have had the right of way along said river in front of said premises and dock, and ought to have had free and unobstructed access to said premises and dock from said river so in front of the same, and from and out of said premises and dock to and along said river, and ought to have had the right during all of said time to pass and repass along the said river in front of said premises and dock at its free will and pleasure. Yet the said defendant well knowing the premises, but wrongfully and unjustly intending to injure the said plaintiff in that behalf, and to deprive it of the free use and benefit of his said right of way and passage along said
river in front of said premises and dock, and whilst the said
7 plaintiff was so possessed of said premises and dock, and access to
and from the same from and to the said river, to wit, on the first day
of November, A. D. 1869, and on divers other days, and at all times between that day and, to wit, the first day of November, 1870, at, to wit, the district aforesaid, wrongfully and injuriously placed and erected, and caused to be placed and erected divers obstructions and hindrances, to wit, a coffer dam and other obstructions and hindrances in, upon, and across the said river in front of said premises and dock, or near to the same, and kept and continued the said obstructions so placed and erected in, upon, and across the said river aforesaid for a long space of time, to wit, from the first day of November, 1869, to the first day of November, 1870, and thereby, during all the time aforesaid, the said river in front of or near to the said premises was greatly obstructed and stopped up by the wrongful and unjust acts of the defendant in that behalf, and the said plaintiff, by means thereof, could not, during the time aforesaid, or any part thereof, enjoy its said right of way along said river as it of right ought to have done, and otherwise might and would have done, and hath been by means of the premises and of the said wrongful acts of the defendant deprived of the use and benefit thereof, and of access to and from said premises and dock from and along said river in front of and near to the same, to wit, at the district aforesaid.

2D COUNT.—Also for that whereas the said plaintiff, at the time
8 of the committing of the grievances hereinafter mentioned, was,
and from thence hitherto hath been and still is, lawfully possessed

of certain other premises and appurtenances situated upon the north side or front of said Chicago River, and between the said La Salle and Wells streets, in said city of Chicago, and in said northern district of Illinois, and the plaintiff further avers that while in said possession of said premises it erected and placed upon the same a certain warehouse and dock and its appurtenances, at great cost, to wit, $50,000, and which were upon said premises during all of the time of the committing of said grievances hereafter mentioned. And it further avers that during all of said time it was lawfully possessed of certain steamboats and vessels, to wit, 20 in number, and of great value; which said boats and vessel' the said plaintiff was so possessed of for the purpose of engaging, and did during all that time use and engage the same in the business of commerce and navigation upon the said river and great lakes and navigable waters connecting the same. And it further avers that it became possessed of said premises and was possessed of the same during all of said time, and did so erect and place thereon the said warehouse, dock, and their appurtenances, and did occupy the same during all of said time for the purpose of the storage of freight and merchandise, and for the receipt and delivery thereof
from off and upon said boats and vessels, and which said
9 freight and merchandise was brought to and carried away from
the said warehouse and dock upon and by the means of said vessels approaching the said dock from said river, and lying along the said dock upon the said river. And it further avers that it became and was so possessed of said premises, dock, and appurtenances, and of said vessels, for the sole purpose of using the same in connection with each other in the transportation of freight and merchandise on said rivers and lakes, and by reason thereof did before the committing of said grievances and since then hitherto has derived great gain and profit by means of the said transportation and storage thereof and in said warehouse.

And the plaintiff further avers that, for the purposes aforesaid and for the carrying on the business aforesaid, free and unobstructed access to and from the same upon said river, and the free and unobstructed navigation thereof along and near to said dock, was necessary, and that by means of the premises it did have and ought to have had at all times the free and unobstructed way and navigation along and upon said river with its said vessels, and to pass along the said river with the same, and upon the same to approach to and lie along said dock and leave the same at all times and at its free will and pleasure, and without any obstruction or hindrance to the same on the part of said defendant.

10 And the plaintiff further avers that notwithstanding the same, and on, to wit, the first day of July, 1860, it commenced to, and did from that time for a long space of time, engage and was engaged in driving a tunnel under and across said river from one side thereof to the other, at and near the premises and dock aforesaid, and did, for that purpose, place and erect coffer dams and other obstructions upon said river while so tunnelling the same.

And the plaintiff further avers that while so tunnelling the said river, for a long space of time, to wit, from the first day of November, 1869, to the first day of November, 1870, did wrongfully and injuriously place and erect, and caused to be placed and erected, divers great obstructions, to wit, coffer dams and wood and stone in, and upon, and across the said river in front of and near to its said dock and warehouse, and did keep and continued the said coffer dams and wood and stone so placed and erected in, upon, and across the said river as aforesaid, for a long space

of time, to wit, from the first day of November, 1869, to the first day of November, 1870, and thereby and by means thereof, and during all the time aforesaid, the said river in front of the said dock and warehouse, and the right of way and navigation upon the same was greatly obstructed, and the said plaintiff could not by means thereof during the time aforesaid, or any part thereof, have, use, or enjoy its said
11 right of way or navigation upon or along said river, and access
to and from said dock and warehouse upon the said river, with its said vessels in the manner and for the purposes aforesaid, as it of right ought to have done, and otherwise might and would have done, and hath been and was by means of the premises deprived of its said use, benefit, and advantage thereof, to wit, at the northern district aforesaid.

3RD COUNT.—Also for that whereas the said plaintiff at the time of the committing of the grievances hereinafter mentioned was and from thence hitherto hath been and still is lawfully possessed of certain other premises and appurtenances, consisting of, to wit, a leasehold interest in the lands and of ownership in and to a certain warehouse and dock and appurtenances erected upon the same, and situated and located on the south side or north front of the Chicago River, and between Clark and Wells streets, in said city of Chicago, to wit, in said northern district of Illinois.

And the plaintiff further avers that said warehouse buildings and dock fronted then and there upon the Chicago River, and that the Chicago River was, at that place and time, and during all the time of the grievances hereinafter complained of, hath been and now is a navigable stream, navigable for boats and vessels ascending and descending said river, and entering and departing the Chicago River aforesaid,
12 and for boats and vessels engaged in navigation and commerce
upon Lake Michigan and the several lakes and waters connected therewith. And the plaintiff further avers and says that its business was and is that of commerce and navigation and the transportation of goods and merchandise to and from Chicago, eastward, along Lake Michigan and the several lakes and navigable waters connected therewith, by a line of boats and vessels; and said dock was constructed and was intended to be and was capable of being used for the docking, landing, loading, and unloading of boats and vessels, transporting goods, as aforesaid, to and from Chicago. And said buildings, warehouses, and dock were intended to be and were used for the docking, warehousing, and storing of goods, wares and merchandise so shipped, carried, and transported by plaintiff by its said line to and from Chicago, as aforesaid, and without the use of a dock and warehouse said plaintiff could not carry on its said business.

And the plaintiff further avers that the said leasehold estate in said premises, and said warehouse, dock, and appurtenances, so placed upon said premises and so owned by said plaintiff, was, during all of the time of the committing of said grievances, of great value, to wit, $100,000. And that during all of said time it was the owner and lawfully possessed of certain steam vessels of great value, to wit, of $500,000, and which said steam vessels ran in and were part of said line, and were
13 engaged in transporting goods, wares, and merchandise to and
from Chicago, as aforesaid.

And it further avers that during all of said time it was in possession of said premises, and so owned and was in said possession of said warehouse, dock, and appurtenances and vessels for the sole purpose of commerce and navigation upon said river and the great lakes and waters connecting the same, and for the storage and transportation by means thereof of merchandise for gain and profit, and by means of which boats and vessels and said dock and warehouse and its said business of transporting goods and of commerce, as aforesaid, the plaintiff made great gains and profits, to wit, fifty thousand dollars a year.

And it further avers that for the carrying on of said business of storage and transportation during said time it was necessary that the said plaintiff should have and enjoy for said purpose the free and unobstructed right of way and navigation of said river in front of and adjoining to the said premises and appurtenances, with its said vessels, and of approaching to and leaving the same on said river, and lying along said dock with said vessels, and that for said purpose the plaintiff avers that it had the right during all of said time to a free and unobstructed passage for its said vessels along and upon said river in front of and near to the said premises.

14 And the plaintiff further avers that prior to and since the committing of said grievances it did have the right to and did enjoy said free and unobstructed passage for its said vessels, and did thereby derive great gain and profit from its said use of said premises and of its said vessels and said free and unobstructed passage upon and along said river and up to and alongside of said dock.

And the plaintiff further avers that notwithstanding the premises and the facts above alleged, and on, to wit, the first day of November, 1869, at, to wit, the district aforesaid, the said defendant did wrongfully and injuriously place and erect and caused to be placed and erected in and along said river divers obstructions and hindrances to the said free and unobstructed passage and navigation by the plaintiff of its boats to and from said dock on said river, to wit, coffer dams and other obstructions, consisting of wood, iron, and stone, and did continue to so obstruct the said passage and navigation of said river and the getting to said dock and warehouse until, to wit, the first day of November, 1870, and thereby, during all the time aforesaid, the said passage and navigation for boats and vessels along said river and to and from said premises upon said river was greatly obstructed and stopped up, and that the said plaintiff by means thereof could and did not, during the time aforesaid, or any part thereof, have or enjoy its said right of pas-
15 sage upon said river and access to and from said premises upon
said river with its said vessels, as of right it ought to have done, and otherwise might and would have done, and hath been and was by means of the premises and in consequence of the facts above alleged deprived of the use, benefit, gain, and advantage thereof.

4TH COUNT.—Also for that whereas the said plaintiff, before and at the time of the committing of the grievances hereinafter mentioned, was and from thence hitherto hath been and still is lawfully possessed and the owner of certain other premises, with the appurtenances, consisting of, to wit, a warehouse building and dock situated on the north side of said river, between, to wit, La Salle and Wells streets, in the said city of Chicago, in the northern district aforesaid. And by reason thereof the said plaintiff during all the time aforesaid ought to have had free and unobstructed access to and from said premises into, through, and over a certain street, to wit, La Salle street, and to the sidewalk upon the side thereof adjoining or near to said premises, and from said premises into said street, and from said street into said premises for itself and servants and horses and vehicles to pass and repass, to go to and return at their free will and pleasure. Yet the said defendant, well knowing the premises, but wrongfully and unjustly intending to injure the said plaintiff in that behalf, and to deprive it of the use and 16 benefit of its said right of way along said street, and from the same to said premises, and from said premises to and into and along said street, whilst it was so possessed and the owner of said premises, and so entitled to said right of way on said street, and to and from the same, to wit, on the first day of November, 1869, and from that time continuously until, to wit, the first day of November, 1870, wrongfully and injuriously stopped up and obstructed the said street and passage along the same and access to and from the said premises to said street, and from said street to the said premises, and the plaintiff by means thereof could not, during the time aforesaid, nor did it have or enjoy its said right of way and said access to and from said premises to and from said street, as it of right ought to have done, and otherwise might and would have done, and thereby hath been deprived of the use, benefit, and advantage thereof, to wit, at the district aforesaid.

5TH COUNT.—And also for that whereas the said plaintiff at the time of the committing of the grievances hereinafter mentioned was and from thence hitherto hath been and still is lawfully possessed of a certain leasehold estate in other premises consisting of, to wit, a piece of ground situated on the north side or front of said Chicago River, between, to wit, La Salle and Wells streets in said city of Chicago in the said northern district of Illinois, and was during all of said 17 time the owner of a certain warehouse and appurtenances erected and placed upon said premises to be by it used, occupied, and enjoyed as a storage and warehouse for the purposes specifically mentioned and set forth in the foregoing counts of this declaration, and was during said time so used and occupied as aforesaid. Yet the defendant, notwithstanding the premises, and contriving and intending to injure, prejudice, and aggrieve the said plaintiff in its said leasehold estate in said ground and in its said ownership and possession of said warehouse and appurtenances whilst the same were so owned by and in the possession of the said plaintiff, to wit, on the first day of March, A. D. 1870, and whilst said defendant was engaged in building a tunnel under the said Chicago River from, to wit, the north end of South La Salle street to, to wit, the south end of North La Salle street, the said defendant did so carelessly conduct itself in that behalf, and so negligently and carelessly dig into and make excavations in said North La Salle street and near to and adjoining the east brick wall of said warehouse and appurtenances, that thereby and through the mere negligence and carelessness of said defendant in so making said excavations the west side or wall of said excavations and which was close to and adjoining the said wall of said warehouse caved in and fell down and thereby and in consequence thereof the said wall of said warehouse was thrown down and greatly injured and damaged, and said ware- 18 house and appurtenances was thereby also greatly damaged, cracked, and strained and otherwise injured, whereby the said plaintiff hath been and still is greatly injured, prejudiced and aggrieved, in his said leasehold estate in said premises and in its said ownership and possession of said warehouse and appurtenances, and the use and enjoyment thereof, to wit, at the northern district aforesaid.

6TH COUNT.—And also for that whereas the said plaintiff, at the time of the committing of the grievances hereinafter mentioned, was, and from thence hitherto hath been and still is the owner of and in the possession of a certain other warehouse and appurtenances situated upon and near to the north side of said Chicago River between said La Salle and Wells streets, and the east wall or side of said warehouse

and appurtenances fronting on and adjoining to the west side of said North La Salle street near to its junction with said river, and being in said city of Chicago in the northern district of Illinois, aforesaid. And the plaintiff further avers that on, to wit, on the first day of November, A. D. 1869, the said defendant was engaged in the construction of a tunnel under said river from the south end of the said North La Salle street to the north end of the said South La Salle street, and in making certain large and deep excavations for that purpose in that part of said North La Salle street, which was near to and adjoining the east side or wall of said warehouse and appurtenances. And the plaintiff further
avers that, the said defendant in so making said excavations so
19 negligently and carelessly conducted itself in that behalf that
the west side or wall of said excavations so near to and adjoining the said east wall of said warehouse and appurtenances or a part thereof caved in and fell down on, to wit, on the first day of April, A. D. 1870, and thereby threw down or caused to be thrown down the said east wall of said warehouse and its appurtenances or a great part thereof, and did thereby and in consequence thereof greatly damage and injure the same and crack, strain, and greatly injure other portions and parts of said warehouse and appurtenances, and which said damage and injury to said warehouse and appurtenances was done and caused solely by and through the said carelessness and negligence of the said defendant in so making and digging said excavations, whereby and by means whereof the said plaintiff hath been greatly injured, aggrieved, and damaged in its said ownership and possession, and use of said warehouse and appurtenances, to wit, at the northern district of Illinois aforesaid.

7TH COUNT.—Also, for that whereas the said plaintiffs at the time of committing of the grievances hereinafter mentioned was, and from thence hitherto hath been and still is lawfully the owner of a certain leasehold estate in other premises, and the owner of certain improvements thereon, consisting of a warehouse and dock, said premises and improvements being located on the northwest corner of North La Salle
street and the said Chicago River, and having a frontage on
20 South La Salle street, also on said river, to wit, in the northern
district aforesaid.

And the plaintiff further avers that the said river was at that place, and during the time of the committing of said grievances complained of and now is a navigable water suitable for the navigation of boats and vessels, including the vessels of the plaintiff hereinafter mentioned; that said river empties into Lake Michigan and would have been during all the time aforesaid so navigable from its said mouth up to and past the said premises, and up to and from the dock on said premises by the said vessels of the plaintiff had it not been for the obstructions and hindrances placed upon the same by the defendant as hereinafter mentioned; and it further avers that during all of the time aforesaid the said North La Salle street was and would have been, had it not been for the obstructions and excavations placed and made by the defendant as hereinafter mentioned, an open and unobstructed street of said city from the said junction with said river along, past, and in front of the said premises.

And the plaintiff further avers that it was during all the time aforesaid engaged in the business and commerce particularly set forth in the foregoing counts, and was during all of said time so possessed of said vessels specified in said counts, and that during all said time it beame and was necessary that it should have control of a dock and

21 warehouse in said city of Chicago to unload and receive and deliver merchandise and freight from, upon, and off its said vessels while so engaged in the navigation of said river and lake, and that for said purpose it made a lease of said premises to one Robert Diefendorf for a large sum of money, to wit, $10,000 per annum; that said lease was so made before the committing of said grievances, to wit, May 1st, 1869, and did, for the reason hereinafter alleged, continue in full force and effect during all the said time of the committing of said grievances, and from thence hitherto and now is in full force and effect.

And the plaintiff further avers that one of the considerations of said lease was and continued to be during all of said time that the said Diefendorf should permit the unloading of said merchandise from its said vessels on said dock, and would then and there receive the same into his possession as wharfinger and warehouseman, and would deliver from out of said warehouse, and of said dock, and into said vessels all the merchandise that should or would be during the continuance of said lease so received by him for transportation from thence upon said vessels of the plaintiff to the various ports and places to which the same should or would be consigned.

And it further avers that but for this agreement made with said
22 tenant it would not have made said lease to him, and that for the sole purpose of being able to make the same or a like arrangement with any tenant of said premises it would not have so made said lease of said premises under which it so acquired and held said leasehold estate, or become the owner of the improvements so upon the same.

And it further avers that the said tenant, Diefendorf, did enter upon his said tenancy and the performance on his part of the said arrangement, and did continue so to do, and did pay all the rent due upon said lease, and did perform his part of said arrangement up to and until the committing of said grievances hereinafter mentioned, and that had it not been for the committing of said grievances he would have so continued in his said tenancy, and paid said rent, and performed said agreement.

And it further avers that during all of the time of the committing of said grievances its said leasehold estate and appurtenances and said lease and arrangement was of great value to it, to wit, $100,000.

And it further avers that said value consisted chiefly of the free and unobstructed navigation of said river, and access upon the same to and from said premises with its said vessels for said purpose, and free and unobstructed use of said street and passage along the same in front of said premises, and that without which the said tenancy of said Diefendorf and said arrangement with him was of little or no value, and
23 that during said time, in order that the same should be of any value, that there should be and have been such free and unobstructed passage upon said river for the said vessels of the plaintiff and said free and unobstructed use of and passage along said street. And that for that purpose the plaintiff doth aver that both it and said tenant had the right during all of said time to such free and unobstructed navigation of said river and said access to and from said premises upon the same, and use of said street, and that both it and said tenant would have had and enjoyed the said right during all of said time had it not been for the committing of said grievances.

And it further avers that notwithstanding the premises and the facts above alleged, and on, to wit, the first day of November, 1869, at, to wit, the district aforesaid, the said defendant did wrongfully and inju-

riously place and erect, and caused to be placed and erected in and along said river divers obstructions and hindrances to the said free and unobstructed navigation of said river by the plaintiff of its said vessels upon said river, and to and from said dock and warehouse on said river, to wit, a coffer-dam and other obstructions, consisting of wood, iron, and stone, and did continue to so obstruct said navigation of said river and said passage to and from said dock and warehouse until, to wit, the first day of November, 1870, and thereby, during
24 all the time aforesaid, the said navigation of said river and
said passage to and from said dock and warehouse upon the same was greatly obstructed and stopped up, and that the said plaintiff, by reason thereof, could and did not, during the time aforesaid, or any part thereof, have or enjoy its said right of navigation and passage upon said river, and said access to and from said dock; and it further avers that, to wit, on the first day of November, 1869, at, to wit, the district aforesaid, the defendant did wrongfully and injuriously make certain deep excavations in said street in front of said premises, and did place obstructions therein, and continued so to do during all of said time, from said first day of November, 1869, until, to wit, the first day of November, 1870, and that thereby and solely by reason thereof the said use of and passage along said street was wholly prevented and rendered impossible, and that thereby the said tenant of the plaintiff could not and did not during the time aforesaid, or any part thereof, have or enjoy his said use of and passage along said street as he ought to have had and done, and otherwise might and would have had and done.

And it further avers that solely in consequence of the said obstructions and hindrances to the said navigation of said river, and the said access upon the same to and from the said dock and warehouse, and the said benefit so resulting to him therefrom from such navigation
25 and access, and in consequence of said excavations and obstruc-
tions in and upon said street; and on, to wit, the first day of November, 1869, notified and informed the plaintiff that by reason thereof his said tenancy had become of little or no value, and that he could not pay said rent, and would be obliged to and would surrender said lease and abandon said premises if it, the plaintiff, would not make a fair deduction of said rent by reason of the premises, or would not allow and pay to him, or deduct from said rent whatever sum of money he should be compelled to and should pay for a like tenancy of similar premises upon said river during the continuance of the committing of said grievances; and it further avers that solely in order to retain the said tenant in the occupation of said premises so leased to him, and to receive said rent, and to have and receive the said advantages resulting to it from the continued performance by said tenant of said agreement, it did then and there agree with the said tenant that it would pay or allow out of said rent whatever sums of money the said tenant should so be compelled to and should pay during said time for said other tenancy, and would so pay and allow for any necessary and reasonable improvements which said tenant might be compelled to and should make upon said premises so to be rented by him in order to make said premises suitable
26 for the carrying on of said business so carried on at said dock
and warehouse before the committing of said grievances, to all of which the said tenant then and there agreed, and also in consideration thereof agreed to continue in said tenancy and pay said rent after deducting said allowances, and also to continue at said premises so to be rented his said performance of said agreement; and all of which was afterwards done and performed by the said tenant during the committing of said grievances.

And it further avers that said tenant did so rent other and similar premises of other parties, and incur said expense in making said necessary improvements, and that the said rent of said other premises and said improvements were paid for by the said tenant, and the same did in all amount to a large sum of money, to wit, $8,000, and which was afterwards, to wit, on the first day of November, 1870, so paid or allowed to said tenant by said plaintiff, and which sum so allowed and paid was much less, to wit, by $5,000, than the said damages to said premises by reason and on account of the said obstructions and excavations; and it doth further aver that it did receive the full benefit of the said performance of said agreement by said tenant at and upon the said other premises so rented so far as was practicable so to do in said premises so rented,
27 which consisted of a dock, or docks, on said river, and place for the handling and storage of said freight and merchandise, and that during the time of the committing of said grievances it did unload on said dock or docks from off its vessels and receive from said dock or docks on its said vessels said merchandise so transported by it during said time.

And it doth further aver that the amount of said merchandise so unloaded and received at said dock or docks last mentioned was much less than it would have unloaded and received upon and from the said other dock during said time had it not been for said obstructions, and that the expense of so unloading and receiving said merchandise, and the access upon said river to and from the same with its said vessels, was much greater than it would have been in so unloading and receiving the same upon said other dock, to wit, $5,000; and the plaintiff doth aver that by means of the premises, and in consequence of the facts above alleged, it hath suffered great damage of, to wit, $15,000 at, to wit, the district aforesaid.

8th COUNT.—And also for that whereas the said plaintiff at the time of the committing of the grievances hereinafter mentioned was, and from thence hitherto hath been, and still is, the owner of, and in the possession of, a certain other warehouse and appurtenances situ-
28 ated upon and near to the north side of said Chicago River between said La Salle and Wells streets and the east side or wall of said warehouse and appurtenances fronting on and adjoining to the west side of said North La Salle street near to its junction with said river, and being in said city of Chicago, in the northern district of Illinois aforesaid; and the plaintiff further avers that on, to wit, *on* the first day of November, 1869, the said defendant was engaged in the construction of a tunnel under said river from the said south end of said North La Salle street to the north end of the said South La Salle street, and in making certain large and deep excavations for that purpose in that part of said North La Salle street which was near to and adjoining the east side or wall of said warehouse and appurtenances; and the plaintiff further avers that the said defendant in so making said excavations so negligently and carelessly conducted itself in that behalf that the west side or wall of said excavations so near to and adjoining the said east wall of said warehouse and appurtenances, or a part thereof, caved in and fell down on, to wit, *on* the first day of April, 1870, and thereby threw down, or caused to be thrown down, the east wall of said warehouse and its appurtenances, or a great part thereof, and did thereby, and in consequence thereof, greatly damage and
29 injure the same and crack, strain, and greatly injure other portions and parts of said warehouse and appurtenances, and which said damage and injury to said warehouse and appurtenances was done

and caused solely by and through the said carelessness and negligence of the said defendant in so making and digging said excavations.

And the plaintiff further avers that said defendant, by reason of his so injuring said warehouse by so excavating near to and adjoining the said east wall of said warehouse and appurtenances whereby, and by means whereof, the said east wall caved in and fell down as aforesaid, the said defendant undertook to, and did pretend to, rebuild and erect a new wall on the east side of said warehouse and appurtenances similar to the said east wall so carelessly and negligently thrown down, or caused to be thrown down, by said defendant as aforesaid, but the plaintiff avers that by reason of the injuring the said warehouse by cracking and straining the same and other portions and parts of the same and appurtenances as aforesaid, great damage hath been done to said warehouse and appurtenances, which said damage said defendant, by reason of his so erecting and rebuilding said wall on the east side of said
warehouse and appurtenances as aforesaid, or by any means
30 whatsoever, hath not hitherto made good to the said plaintiff.
Whereby, and by means whereof, the said plaintiff hath been greatly injured and aggrieved and suffered great damage of, to wit, $1,000 at, to wit, the district aforesaid.

And the plaintiff further avers that the said wall so undertaken to be rebuilt by said defendant was insufficiently and improperly rebuilt, and was not of equal value to the one so destroyed, and that the damage so sustained by reason thereof was equal to at least $1,000: to the damage of the plaintiff of $15,000.

Wherefore it brings its suit, &c.

WAITE & CLARKE,
Its Att'ys.

(Endorsed:) Filed Nov. 6, 1872. Wm H. Bradley, cl'k.

And afterwards, to wit, on the 18th day of December, A. D. 1872, in the December term of said court, in the record of the proceedings thereof before the Hon. James C. Hopkins, judge, in said entitled cause is the following entry, to wit:

THE NORTHERN TRANSPORTATION COMPANY
v.
THE CITY OF CHICAGO.
} Trespass on the case.

On motion of the defendant, by its attorney, the time is ex-
31 tended ten days to plead herein. Afterwards, to wit, on the 28th
day of December, A. D. 1872, said defendant, by its attorney, filed in said clerk's office its demurrers and plea in said entitled cause, which are in the words and figures following, to wit:

Demurrers and plea.

UNITED STATES OF AMERICA,
Northern District of Illinois, ss:

Circuit court of the United States for the northern district of Illinois.

CITY OF CHICAGO
ads.
THE NORTHERN TRANSPORTATION COMPANY of Ohio.
} Case.

And now comes the defendant, the City of Chicago, by I. N. Stiles, its attorney, and demurs to the first count of the declaration of the

Northern Transportation Company of Ohio, plaintiff; and for cause of demurrer to said first count of said declaration says that the said first count of said declaration and the matters therein contained, in manner and form as the same are therein stated and set forth, are not sufficient in law for the said plaintiff to have or maintain its aforesaid action thereof against the said defendant, and it, the said defendant, is not bound by law to answer the same.

And the said defendant shows to the court here the following special causes of demurrer to said first count of said declaration, that is to say:

32 1st. That it does not appear in and by said first count of said declaration that the Chicago River therein named was, at the time of the alleged obstruction of the same by said defendant, a navigable stream.

2nd. That it does not appear, in and by said first count of said declaration, that the said plaintiff, during the time specified (or any part thereof), to wit, from the first day of November, A. D. 1869, to the first day of November, A. D. 1870, had any right of way along said Chicago River, in front of the dock and premises in said first count designated and described.

3rd. That it does not appear, and is not shown, in and by said first count of said declaration, that said plaintiff suffered or sustained any loss or damage by reason of the alleged obstruction of said Chicago River by said defendant.

4th. And also that said first count of said declaration is in other respects uncertain, informal, and insufficient; wherefore the defendant prays judgment, &c.

I. N. STILES,
Def't's Attorney.

United States circuit court, northern district of Illinois.

CITY OF CHICAGO
ads.
THE NORTHERN TRANSPORTATION COMPANY of Ohio. } Case.

33 And the said defendant, by I. N. Stiles, his attorney, comes and defends the wrong & injury, &c., and says that the said second, third, and fourth counts of said plaintiff's said declaration, and each and every of them, and the matters therein contained, in manner and form, as the same are therein stated and set forth, are not sufficient in law for the said plaintiff to have or maintain its aforesaid action thereof against the said defendant, and the defendant is not bound by law to answer the same; and this the defendant is ready to verify, wherefore the defendant prays judgment, &c.

I. N. STILES,
Def't's Atty.

United States circuit court northern district of Illinois.

CITY OF CHICAGO
ads.
THE NORTHERN TRANSPORTATION COMPANY of Ohio. } Case.

And the said defendant, by I. N. Stiles, its attorney, comes and defends the wrong & injury when, &c., and as to the fifth, sixth, seventh, and eighth counts of said plaintiff's declaration, says that it is not guilty of the said supposed grievances laid to its charge in manner and form as the said plaintiff hath, in said fifth, sixth, seventh, and eighth counts of its said declaration thereof, complained against it; and of this the said defendant puts itself upon the country, &c.

34 I. N. STILES,
Def't's Att'y.

(Endorsed:) Filed Dec. 28, 1872. W'm H. Bradley, cl'k.

Afterwards, to wit, on the 30th day of September, A. D. 1873, in the July term of said court, in the record of the proceedings thereof in said entitled cause, before the Hon. Henry W. Blodgett, judge, is the following entry, to wit:

NORTHERN TRANSPORTATION COMPANY
v.
THE CITY OF CHICAGO.
} Trespass on the case.

Now come the parties, by their attorneys, and now comes on to be heard the demurrer of the defendant to the first, second, third, and fourth counts of the declaration herein, and after hearing the arguments of counsel, the court takes the same under advisement.

And afterwards, to wit, on the 1st day of October, A. D. 1873, in the said July term of said court, in the record of the proceedings thereof in said entitled cause, before the Hon. Henry W. Blodgett, judge, is the following entry, to wit:

NORTHERN TRANSPORTATION COMPANY
vs.
THE CITY OF CHICAGO.
} Trespass on the case.

35 The court having considered, and being now fully advised upon the demurrer of the defendant to the first, second, third, and fourth counts of the declaration, sustains said demurrer to the second count, and overrules it as to the first, third, and fourth counts.

Afterwards, to wit, on the 4th day of October, A. D. 1873, in the said July term of said court, in the record of the proceedings thereof in said entitled cause, before the Hon. Henry W. Blodgett, judge, is the following entry, to wit:

NORTHERN TRANSPORTATION COMPANY
vs.
THE CITY OF CHICAGO.
} Trespass on the case.

On motion of the plaintiff, by its attorney, it is ordered by the court that the judgment on the demurrer of the defendant to the second count of the declaration herein, entered on Wednesday last, be set aside and vacated, and thereupon leave is given the plaintiff to dismiss said second count, and it is ordered that said second count be dismissed.

And afterwards, to wit, on the 14th day of October, A. D. 1873, said defendant, by its attorneys, filed in said clerk's office its plea in said entitled cause, which said plea is in the words and figures following, to wit:

36 *Plea.*

UNITED STATES OF AMERICA,
Northern District of Illinois, ss:

United States circuit court.

CITY OF CHICAGO
ads.
THE NORTHERN TRANSPORTATION COMPANY of Ohio. } Case.

And the defendant, the City of Chicago, by I. N. Stiles, its attorney, comes and defends the wrong & injury when, &c., and says that it is not guilty of the supposed grievances laid to its charge, or any or either of them, in manner and form as the plaintiff hath in its declaration above thereof complained against it, and of this the defendant puts itself upon the country, &c.

I. N. STILES,
Def't's Att'y.

(Endorsed :) Filed Oct. 14, 1873. W'm. H. Bradley, cl'k.

Afterwards, to wit, on the 18th day of November, A. D. 1874, in the adjourned October term of said court in the record of the proceedings thereof in said entitled cause before the Hon. Henry W. Blodgett, judge, is the following entry, to wit:

THE NORTHERN TRANSPORTATION COMPANY of Ohio
vs.
THE CITY OF CHICAGO. } Case.

37 Now come the parties by their attorneys and upon issue joined thereupon come a jury of good and lawful men, to wit, Charles R. Potter, Henry S. Pentiss, John Aynslee, Walter S. Johnson, Alfred Strong, Dennis Putnam, E. Woodbridge, R. H. Gettliny, Philip S. Morner, James B. F. Chesney, J. C. Wheaton, and Reby S. Palmer, who were all duly elected, tried, and sworn well and truly to try said issue, and after hearing a part of the evidence, the hour of adjournment having arrived, the further trial of the cause is postponed until tomorrow morning.

Afterwards, to wit, on the 19th day of November, A. D. 1874, in the said adjourned October term of said court, in the record of the proceedings thereof in said entitled cause before the Hon. Henry W. Blodgett, judge, is the following entry, to wit:

THE NORTHERN TRANSPORTATION COMPANY of Ohio
vs.
THE CITY OF CHICAGO. } Case.

Now come again the parties, by their attorneys, and now come also the jury in this behalf empaneled and sworn, and after hearing the concluding evidence and a part of the arguments of counsel, the hour of adjournment having arrived, the further trial of the cause is postponed until to-morrow morning.

38 And afterwards, to wit, on the 20th day of November, A. D. 1874, in the said adjourned October term of said court, in the record of the proceedings thereof in said entitled cause, before the Hon. Henry W. Blodgett, judge, is the following entry, to wit:

THE NORTHERN TRANSPORTATION COMPANY of Ohio *vs.* THE CITY OF CHICAGO. } Case.

Now come again the parties, by their attorneys, and now come also the jury in this behalf empaneled and sworn, and after hearing the concluding arguments of counsel and receiving the instructions of the court the jury retired to consider of their verdict, and after a short absence the jury returned into court the following verdict, to wit: We, the jury, find the defendant guilty and assess the plaintiff's damages to the sum of one hundred dollars.

And afterwards, to wit, on the 21st day of November, A. D. 1874, said plaintiff, by its attorneys, filed in said clerk's office its motion for a new trial in said entitled cause, which said motion is in the words and figures following, to wit:

Motion for a new trial.

UNITED STATES OF AMERICA.

Circuit court for the northern district of Illinois.

NORTHERN TRANSPORTATION COMPANY OF OHIO *vs.* CITY OF CHICAGO. }

39 And now comes the said plaintiff, by Waite & Clarke its attorneys, and moves this honorable court for a new trial in the above cause.

WAITE & CLARKE,
Pl'ff's Att'ys.

(Endorsed:) Filed Nov. 21, 1874. W'm H. Bradley, cl'k.

And afterwards, to wit, on the 13th day of July, A. D. 1875, in the July term of said court, in the record of the proceedings thereof in said entitled cause, before the Hon. Henry W. Blodgett, judge, is the following entry, to wit:

THE NORTHERN TRANSPORTATION COMPANY of Ohio *vs.* THE CITY OF CHICAGO. } Trespass on the case.

The court having considered and being now fully advised upon the motion of the plaintiff heretofore filed herein for a new trial of this cause, overrules the same and awards judgment.

It is thereupon considered and adjudged by the court that the plaintiff do have and recover of the defendant the said sum of one hundred dollars, its damages so as aforesaid assessed.

And on the same day, to wit, the 13th day of July, A. D. 1875, on the hearing of said cause, the following exceptions were taken and 40 allowed by the court and made of record in said cause and are in the words and figures following, to wit:

Bill of exceptions.

THE UNITED STATES OF AMERICA,
Northern District of Illinois, ss:

Circuit court of the United States within and for the northern district of Illinois aforesaid. October term, A. D. 1874.

NORTHERN TRANSPORTATION COMPANY, A CORPORATION incorporated under and by virtue of the laws of the State of Ohio and a citizen of the State of Ohio,
vs.
CITY OF CHICAGO, A CORPORATION INCORPORATED under the laws of the State of Illinois and a citizen of the State of Illinois.

Be it remembered that on the trial of this cause in this term the plaintiff gave in evidence in his behalf as follows, that is to say:

The plaintiff proved that it had a ground-lease from Timothy Wright of lot number one in block No. four in the original town of Chicago, Cook County, Illinois, with the dock and wharfing rights and privileges from April 1st, 1867, to April 1st, 1877, for which the plaintiff has to pay rent to said Wright for such leased premises the sum of thirty-four 41 hundred and fifty dollars per annum, payable quarterly, and which lease provided for a renewal for further terms upon the plaintiff's paying six per centum per annum rent for said leased premises upon the appraised value of the lot without the buildings; and during the continuance of such lease and all renewals of the same the plaintiffs to pay all taxes and water-rents on said demised premises.

Robert Diefendorf was then called as a witness for the plaintiff and testified that for more than eight years he had been and now was the agent of the plaintiff; that plaintiffs own and run a line of propellers from Ogdensburg, in the State of New York, to Chicago, in the State of Illinois, on the lakes and rivers, touching at intermediate points and places engaged in the carrying of freight and passengers, and have been so employed and engaged for the last 22 or 23 years. That during the years 1869 & 1870 they had 13 or 14 propellers running in said line from Ogdensburg to Chicago and return, five of them arriving and departing each week from said leased premises during the season of navigation, the plaintiffs' propellers arriving and departing from the said dock located upon the premises in said lease mentioned. That on the first day of November, 1869, the plaintiff was in the possession of the premises described in said lease. At that time the plaintiffs had upon said premises a warehouse and shed owned and constructed by the 42 plaintiff on said premises. This warehouse had been constructed by the plaintiff on the premises in the lease described prior to that date, at a cost to the plaintiff of over $17,000.00 It was built for doing the said business of the plaintiff at Chicago, for loading and unloading the freight and passengers carried by said propellers of said line to and from said premises, and contained an office for its use. The

premises in question and being the ones described in said lease abutted and fronted on the Chicago River, on the south side of which lot and abutting on and connected with said river was located the dock at which the plaintiffs' propellers loaded and unloaded their said passengers and freight so carried by them to and from said dock and premises. This dock was on the entire front on the south side of said premises and was 80 ft. in length so abutting on said river. On the east side of said premises and bounding it on the east was La Salle st. On the north side of said premises was North Water s't, which was used by and on which were the tracks of the North Western Railroad and on the west side of and contiguous to said premises was the dock and warehouse of the Grand Trunk Railway, and there was no other approach to said docks and warehouse of the plaintiff. The warehouse and sheds occupied the entire said lot except an open space at the south end and adjoining the dock and river used for handling freight. The freight was carted
43 to and taken out of the warehouse and from the docks on La Salle s't. The North Water street front was only used to receive flour from the North Western Railroad, the tracks preventing or interfering with carting goods to and from the dock and warehouse by way of North Water s't. While the plaintiff was so engaged and so occupying said premises the defendant, on or about Nov. 1, 1869, commenced to build a tunnel across the Chicago River at La Salle s't and continued engaged in building the same till some time in the fall of 1870.

At the time the defendant commenced to build this tunnel all the business of the plaintiff at Chicago was done at this dock and warehouse and on said premises. That the plaintiff had so used said dock and warehouse and run their boats thereto ever since it commenced to do business. That the Chicago River is navigable up to and past and far beyond said dock by all boats navigating the lakes & rivers, and all propellers passing up and down the river during all of said time could load and unload and land at said dock and land and unload freight to & from said dock and warehouse previous to the defendant's so commencing to tunnel said river. In constructing the tunnel the city commenced on the east line of said lot, at the intersection of the river with it and La Salle s't and drove piles in front of the dock west for about 40 feet and extending out $\frac{2}{3}$ of the way across the river. They commenced to drive piles from the line of the dock and into the river for the
44 purpose of building a coffer dam in the river. The piles for the coffer-dam were driven by a spile driver located in the river in front of the dock in the space not occupied by the coffer dam. In constructing the coffer-dam two rows of spiles were driven one against the front of the dock and the other farther off, the space between the rows of spiles was filled; the center row of spiles on the north side of the coffer-dam was close to the dock. This coffer-dam then constructed remained there until some time in August, 1870. They commenced about Nov. 1st, 1869, to excavate La Salle s't and excavated the same to Michigan s't. Michigan s't is the next street north of Kinzie s't and Kinzie s't is the next street north of North Water s't. There were four doors into the warehouse from La Salle s't. After they commenced to excavate La Lalle s't the plaintiff could not get into the warehouse at all or into the premises except through a door on North Water s't, which had not been used for receiving freight except flour from the railroad. In getting to the door the track of the North Western Railroad had to be crossed. After the construction of the coffer-dam and while it remained there plaintiff could not bring its boats up to the docks or premises or land freight and passengers to and from its boats upon said

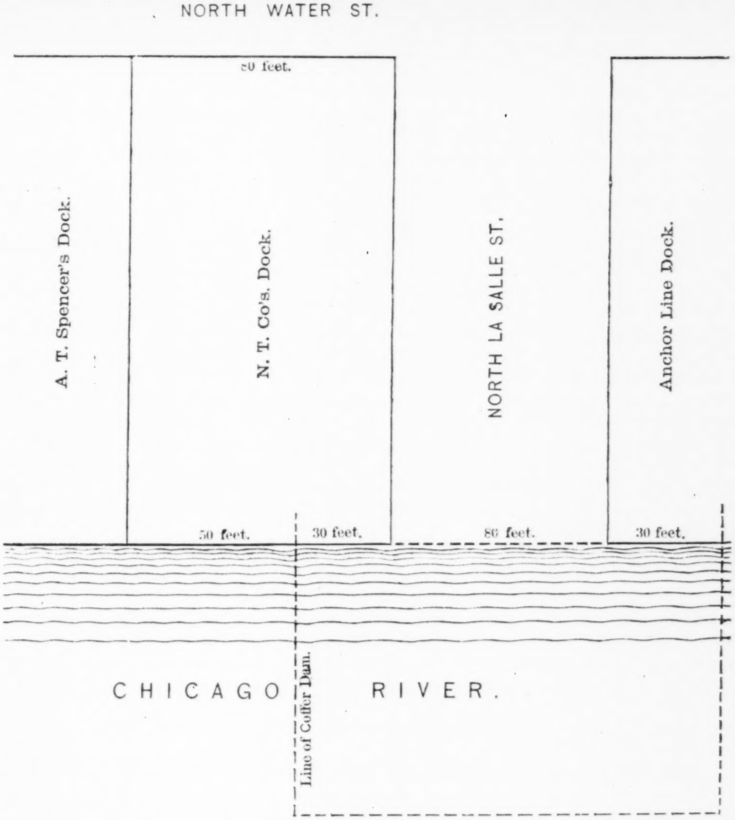
dock and premises, and were compelled to and did rent and occupy another dock and shed east of Rush s't bridge, and also to procure another
dock on the south side of the river between La Salle and Clark
45 streets. They were compelled to and did get such docks by reason
of the obstruction placed in the river by defendant's coffer-dam.

In the fall of 1869 plaintiff moved to and occupied a dock and shed just east of Rush s't bridge, on the north side of the river. In the spring they also procured and occupied a dock on the south side of the river, between La Salle and Clark streets and east of La Salle. The reason of such removal was the plaintiff's inability to get its steamers to its dock to discharge and receive passengers and freight from it by reason of such coffer-dam and river obstructions, and also by reason of the plaintiff's inability to use the warehouse on account of the said obstructions and excavations on La Salle s't. That a fair rental value of plaintiff's dock and warehouse at the time said coffer-dam was constructed and obstructions were made would be from 7 to 8 thousand dollars per annum, say $7,500.00 per annum. This would include the warehouse, but it, the warehouse, would be of very little, if any, value to rent without the dock. Such property cannot be rented separately or from month to month, but is rented together, by the year or season of navigation. No one would rent such property by the month, but it is rented by the season or year. Plaintiffs paid $3,500 ground-rent for the lot, and taxes; the taxes varied from year to year, but amounted to about $600.00, making $4,100.00. The interest on the value of the warehouse, at 10 per cent., amounted to between 17 & 18
hundred dollars per annum. In addition there was the cost
46 of insurance on the property, of about $300 per year. The plaintiff
was kept out of the use of the dock and warehouse until the obstructions were removed, which was about Aug. 1st, 1870. The plaintiff, on account of these obstructions, had to rent another dock, as above stated. They had to rent it for the entire year of 1870. Witness was plaintiff's agent. The existing arrangement between plaintiff and witness was that witness, as plaintiff's agent, was to do its business, and was to have the use of its building and dock by his paying the ground-rent, according to the lease, the taxes, insurance, and ten per cent. interest on the cost of the warehouse, between 17 & 18 hundred dollars, witness to pay all the expenses of doing the business, and the plaintiff paid him a commission on the freight handled. By means of having thus to remove from the dock and rent others, and to employ additional hands in handling freight at the other docks, because they were not so convenient as the other docks and warehouse had been, on getting back to plaintiff's dock, after the obstructions were removed in the river, the plaintiff and witness had a final settlement together, and plaintiffs in such settlement paid him $7,837 on account of the actual extra expenses he had been put to in thus renting the other dock and employing additional hands by reason of having been thus compelled to leave this dock
and warehouse. This sum was made up of the actual rent and
47 expenses so incurred and paid out while so driven from such dock
and warehouse. Witness produced the items of such account, and showed such extra expenses paid to be $7,837. All of this was the rent so paid for the other docks, except $2,900.

Witness further stated that, by reason of this settlement, he has no claim on any one for this loss or damage, but it now belongs to the plaintiff. The office occupied the whole width of the south front of the building. In excavating for the tunnel the office gave way at the southeast corner. The contractors on the tunnel braced it up, but it

would not hold, and they took down about 25 f't of the wall on the
southeast corner. The whole wall on the east side was braced up. The
falling was occasioned by the caving in of the excavation on La Salle
s't made by the city for the tunnel. The timbers used before the mason-
work was put in were not strong enough to hold the ground from caving
in. The contractors on the tunnel rebuilt the wall of the warehouse
that fell down. Afterwards a portion of the wall of the warehouse at
the northeast corner fell in. The excavation of the tunnel fell in ex-
tending under the foundation of the warehouse. The contractors also
repaired this. In excavating for the tunnel on La Salle st. they com-
menced at the river edge and worked northward. In making the exca-
vation the city occupied the whole of La Salle st. from the river
48 to Michigan st., so that there could not be any access to the
warehouse from La Salle st. As they excavated they put in
timbers to support the ground until the brick could be laid for the arch
of the tunnel. The timbers gave way on the side next to the ware-
house, and the ground caved in, carrying, as above stated, a part of
the wall of the warehouse with it, and causing the walls to crack the
whole length of the warehouse. The water in some way broke in be-
fore the timbers were carried away. In the southeast corner of the
warehouse was a brick vault. Since the contractors repaired the wall
that fell down, this and the east side of the building have settled and
cracked by the settling of the building. The building is generally dam-
aged and thrown out of shape. It is rendered less valuable by means
thereof. The inside walls clear through the whole 80 f't are cracked
and thrown out of line and damaged; that this damage to the building
was about $1,000.00. That portion of the premises, river, and street in
question is shown by the following map, which was given in evidence:

48½



49 The plaintiff offered further testimony tending to sustain the evidence of said Diefendorf, and to show that during said time the plaintiff could or did have no access to said dock and premises, or from the same, which was of any benefit to the plaintiff, on account of said acts of defendant, and that the work was negligently and improperly done in the construction of said coffer-dam, so far as relates to the receiving of earth on each side of the excavation in La Salle st. east of said warehouse, & that the injury to said warehouse resulted therefrom.

The plaintiff further proved by Charles E. Simmons, a witness, that said lot one, block four, is situated in the original town of Chicago. The plat of said original town was never acknowledged by the owners of the land or their attorney duly authorized in the manner as deeds of land are required to be acknowledged, nor was there any acknowledgment made of any kind on this plat, which was recorded in the county of Cook, where said lot one is situated, and that this plat was twice so recorded, but it never was acknowledged by any one in any way, and was the only plat so recorded in said Cook County.

The defendant offered testimony tending to prove that the work was carefully and well done; that it was done without unnecessary delay, and that a coffer-dam, such as was constructed, was necessary 50 for the construction of the tunnel in question, and that the plaintiff could, during the time, have had access to a portion of the premises with its boats, and such obstructions of access to said warehouse while said work was in progress, and to its completion, were necessary and unavoidable in the proper construction of said tunnel.

And the plaintiff, on its part, asked the court to charge the jury as follows:

First. That if they find from the evidence in this case that the lot in question, and La Salle st. adjoining the same, was situated in the original town of Chicago, and that no map or plat of said original town of Chicago containing the portion of the same where is situated the lot described in the lease from Wright, and the so-called La Salle street, has ever been acknowledged by the owner or any one making such subdivision, or recorded with any acknowledgment thereon in the recorder's office of the county of Cook aforesaid, where the same is situated; that the city had no right to enter upon La Salle st. and excavate opposite the premises of the plaintiff, and to build La Salle st. tunnel, and do the work thereon, as proved in this case, without making just compensation to the plaintiff for the injury occasioned to the plaintiff thereby; which instruction the court refused to give, to which refusal the plaintiff then and there excepted.

2nd. The jury are instructed that if they believe from the evi- 51 dence that neither of the said plats, which were so recorded, were ever acknowledged in fact by any one in any way, and that said two plats are the only plats that were so made of said premises and said portion of La Salle street; the jury are instructed, as a matter of law, that the fee to said street has never been vested in said defendant, and that therefore you will allow the plaintiff such damages or compensation as you think from the evidence it is justly entitled to by reason of the said obstructions or excavations, as you shall so find were made by the defendant in that portion of said street contiguous to said premises of the plaintiff; which instruction the court refused to give, to which refusal the plaintiff then & there excepted.

3. That the Chicago River is not only proved to be in fact a navigable river, but is declared such by law, and the city of Chicago cannot obstruct the same or materially obstruct the same in front of the plaintiff's dock, even if authorized by law to do so, without just compensation for any special damage which any person may suffer by reason of such obstruction; which instruction the court refused to give, and to which refusal the plaintiff then and there excepted.

4. If the jury find from the evidence in this case that the plaintiff's dock fronts on the Chicago River, and that previous to the acts complained of the propellers of the plaintiff had been in the habit of loading and unloading freight to and from said dock, and running 52 its boats to such dock, the Chicago River is, by the fact of its being so navigated, a public navigable river, and that while the right of navigation is a right common to all, yet if the jury find that in the construction of the coffer-dam in front of the plaintiff's dock by the defendants, as proved by the witnesses in this case, the plaintiff has suffered special damages not common to others navigating the river, or other property-owners along the river, for such special damages the

plaintiff is entitled to recover in this action; which instruction the court then & there refused to give, to which refusal to give such instruction the plaintiff then and there duly excepted.

5. And the plaintiffs further asked the court to instruct the jury, from the evidence in the case, that if they find that the plaintiff has sustained special damage by the building of the coffer-dam by the defendant in front of the plaintiffs' dock and warehouse, as proved in this case, not common to all property-owners or the public, the plaintiff can recover for the same in this action; which the court refused to give, and the plaintiff then and there excepted to the refusal to give such instruction.

6. If the jury find from the evidence in the case that in the construction of the tunnel across the river on La Salle street by the excavations in the street, as proved, in front of the plaintiffs' warehouse, by
53 the defendants, the plaintiff has sustained special damage not
common to all property-owners or the public, the plaintiff can recover for the same in this action; which the court refused to give, to the refusal to give which instruction the plaintiff then and there excepted.

7. The plaintiff asked the court to further instruct the jury that if they believe from the evidence that the defendant, in the construction of said tunnel, placed obstructions in the river in front of the plaintiffs' dock and warehouse, so that the plaintiff, during the period in question, was practically prevented access to and from the same by its propellers to unload and load passengers and freight therefrom on its propellers, and that the plaintiff was, during said time, partially deprived of the beneficial use of its dock and warehouse from the river side thereof, then they are instructed to allow to plaintiff for such loss and damage as it has sustained thereby; which instruction the court refused, to which refusal the plaintiff then and there duly excepted.

And thereupon the court charged the jury as follows:

"GENTLEMEN OF THE JURY: This is an action brought by the plaintiff to recover damages by reason of having been deprived of lot 1 in block 4 in the original town of Chicago, by the construction of the La Salle street tunnel.

54 "It appears from the evidence in the case, and it may be taken
as one of the admitted or conceded facts, that the plaintiff was in possession of the lot in question under a lease from Timothy Wright, which, upon certain contingencies, was to extend until 1877; that the lot in question was bounded upon the east side by La Salle street, and on the south it abutted upon the Chicago River, and was docked for the purposes of enabling vessels to approach alongside the end of the lot, or the side of the lot, and to there load and unload, and lie for the purpose of commerce, and that the lot was also occupied or built over by a warehouse, which was used by the plaintiff for the purpose of transacting its business. It also appears that the plaintiff is a corporation created under the laws of some other State than this—whether Ohio or New York is not material for the purposes of this case—and was engaged in the business of transporting freight and passengers by a line of propellers between the city of Chicago and the city of Ogdensburg, and transacting a general transportation business.

["It is conceded that La Salle street extends, as laid out, across the river, and is one of the streets of the city of Chicago. Whether it was so platted, and the plat so acknowledged as to vest the fee-simple of the ground covered by the street in the corporate city for the purposes of a street, or whether, by the platting and dedication in this case, the
55 city only acquired the right to use the ground as a street—as a

common public highway—is immaterial. But the testimony on the part of the plaintiff tends to show that thestreet was only so platted and recorded as that the right of way only is vested in the city authorities, and that the fee-simple in the land did not vest in the city authorities. I do not consider, however, that the distinction is material for the purposes of this case."]

All that part of the charge from and including the words "it is conceded that La Salle street extends" to and including the words "for the purposes of this case," the plaintiff then and there excepted, the same being enclosed in brackets.

"It is also admitted that the defendant at the time mentioned—that is, in the month of November, 1869—entered upon La Salle street for the purpose of constructing a tunnel thereon and commenced the excavation necessary to construct the tunnel, as has been described to you by the witnesses, taking out the whole body of the earth as material in the center of the street to within from 18 to 20 feet of the sides of the street, down to the depth of from 30 to 40 feet, removing the material and replacing in the excavation thus made the masonry for the construction of the tunnel; and that, for the purpose of constructing the tunnel under the river, the city entered upon the river in front of a portion of the
56 plaintiff's lot about 25 feet, and extended from that front a coffer-
dam somewhat beyond the middle of the river, thereby depriving the plaintiff of access to his lot to the extent of this twenty five feet, and to a considerable extent impairing the plaintiff's access to the remainder of his lot, so that he could not use his lot as conveniently as before this obstruction was placed there; not that the obstruction was total, but it was so great as to seriously impair the plaintiff's use of the property during the time this coffer-dam was retained in place.

"It is in proof on the part of the plaintiff that by reason of the interference caused by the construction of this tunnel in La Salle and by the construction of the coffer-dam in the river, the plaintiff was for the time being obliged to withdraw the transaction of the most of its business from this lot and obliged to rent other premises during the season of 1870 at which to transact their business, and also, in the fall of 1869, to close up their business for the fall. It is also proven on the part of the plaintiff and insisted on the part of the defendant that the plaintiff had made arrangements with M'r Diffendorf by which Diffendorf took possession of the premises in question, paid the rental upon them, paid the plaintiff a certain amount of compensation for the expenditures which the plaintiff had put upon the premises by way of improvement, such as erecting the buildings, etc., and paid the insurance and the
57 taxes; that M'r Diffendorf, as the plaintiff's agent, transacted
upon the premises the plaintiff's business on commission, and, on being compelled to rent other premises, M'r Diffendorf, at the end of the season of 1870, made a settlement with the plaintiff by which certain damages were allowed him for the inconvenience and expenses to which he had been subjected. While it may not be said to be an admitted fact in the case, there is no testimony on the part of the defendant disproving it, and the plaintiff's proof may be considered sufficient to establish it as a fact before the jury.

"The proof on the part of the defendant tends to show that the construction of this coffer-dam in the river was necessary for the purposes of constructing the tunnel in question; that there was no practical method known to persons skilled in the business by which this tunnel could have been constructed except by the construction of the coffer-dam so as to enable the excavation to be made in the bed of the river.

The evidence on the part of the defendant also tends to show that there was no unreasonable delay in the pushing forward of this work; that it was done as rapidly as it could be done, and there being no evidence on the part of the plaintiff to show that there was any unreasonable delay, it may be taken as a proven fact in the case that the construction of the coffer-dam was necessary to the progress of the work,
58 and that the work was pushed forward with reasonable vigor and despatch.

"Taking, then, these conceded and established facts in the case, [I shall deem it my duty to withdraw from your consideration a large portion of the claim which the plaintiff has made against the defendant in this case, as I hold the law to be well settled, and so charge you as the law of this case, that the defendant had the right under the law to enter upon La Salle street and make such public improvements as in the judgment of the city authorities were necessary, and to construct the tunnel in question."]

To all that part of the charge from and including the words "I shall deem it my duty" to and including the words "to construct the tunnel in question" the plaintiff then and there excepted, the part so excepted to being enclosed in brackets.

["And I further instruct you that they also had the right for that purpose to enter upon the portion of the river in front of the plaintiff's lot and construct the coffer-dam there, if it was necessary in order to enable them to construct the tunnel."]

To all that part of the charge from and including the words "and I further instruct you" to and including the words "to construct the tunnel" the plaintiff then and there excepted, the same being enclosed in brackets.

59 "That the plaintiff took its lot subject to the right of the city to make these necessary public improvements in the streets; that the method of crossing the river at this point was one to be determined by the city authorities; they could decide whether they would cross or have the public cross the river by a ferry, by a bridge, or by a tunnel, and when they had determined to effect the crossing by a tunnel, they had a right to use and occupy so much of the street as was necessary to construct the tunnel, using due skill and care and despatch always in doing it, so as not unnecessarily to interfere with private property."]

To all that part of the charge from and including the words "the plaintiff took its lot" to and including the words "to interfere with private property" the plaintiff then and there duly excepted, the same being enclosed in brackets.

["That although the plaintiff may for the time being have been deprived of the beneficial use of his property by such entry upon the street; although access to the property through the street may have been practically prevented by the occupation of the street for the purposes of constructing the tunnel, and although access to the lot from the river may have been partially prevented during this time, yet these were incidental inconveniences to which the plaintiff, as the owner of this lot, must submit in order that the public may be accommodated
60 by the construction of this tunnel; that the city had the same right to enter upon the river for the purpose of erecting works there to facilitate the construction of the tunnel that it had to enter upon the street and construct the tunnel itself, always, however, subject to the condition that they should not unnecessarily or negligently injure the plaintiff."]

To all that part of the charge from and including the words "that although the plaintiff may" to and including the words "negligently injure the plaintiff," the plaintiff then and there duly excepted, the part so excepted to being included in brackets.

And the plaintiff further specially excepts to the same, because, 1st, to the entire last instruction as not correctly stating the law in such cases; 2d, to the following portion thereof, "and although access to the lot from the river may have been partially prevented during this time, yet these were incidental inconveniences to which the plaintiff, as owner of the lot, "must submit," &c.; because it in fact assumes and instructs the jury that the obstruction in the river, shown by the evidence, was but partial, and subjected the plaintiff to inconveniences only, when in fact the evidence shows that said obstructions were of such a character as to deprive the plaintiff of all beneficial use of the property from the river; and, 3rd, because the materiality of such ob-
61 structions and their nature and effect on the plaintiff's rights
was not left to the jury, as prayed for, in the instructions above set forth, asked by the plaintiff and refused by the court, instead of being practically assumed against the plaintiff and taken away from the consideration of the jury.

"If, for instance, there was a want of due care in the management of the excavation, so that a portion of the plaintiff's walls was caused to crack or break down, by reason of negligence, then the defendant is liable for such negligence, but not liable for the general right of entering upon the premises, and therefore if you find from the evidence in this case, that by reason of the negligence on the part of the defendant, or its contractors, which is the same thing, in the bracing or staying of the banks of this tunnel or cut, the walls of the plaintiff's building were caused to fall down or break or crack, or become so impaired that it was necessary to take them down, then the plaintiff would be entitled to recover such damage as the building sustained thereby, but the exclusion from the use of the building, or from the beneficial use which has been complained of by reason of the necessary occupation of the street (because we must presume that it was necessary) while the tunnel was being constructed, and from the access to his lot by the
62 river as conveniently as he otherwise would have had but for the
necessary construction of the coffer-dam, does not entitle him to the damages which he sustained by such exclusion. I cannot distinguish the damage which the plaintiff sustained by reason of the exclusion from the lot in this case from that which every lot-owner sustains upon the streets of a city by the tearing up of the street for the purposes of laying water-pipes, or for the purpose of grading or paving, or any other necessary work of repairing or improving the street. It is only greater in degree. The plaintiff in this case may have been excluded from the enjoyment of this property eight months. The ordinary citizen by the laying of water-pipes may have been excluded only for a week or a day from the convenient access to his premises, but it is the same kind of injury, and only greater in degree. It is not a taking of the plaintiff's property for public uses. It is only subjecting him to inconvenience for the time being by the construction of public works, and as such it is one of the incidents to owning a lot in a city, abutting upon a street and upon navigable water.

"As I said before, this excludes from your consideration, therefore, the main element of damage which the plaintiff has put in evidence here; that is, the expense of hiring other premises upon which to carry on its business during the season of 1870.

63 ["There is left, however, as I said before, the question to be

considered by you in the light of the evidence, as to whether this work in La Salle street was so unskillfully or negligently done as to cause any part of the walls to fall or the building to be impaired. You have heard all the testimony bearing upon this question. The testimony tends to show, and does show, if I may so state, that the southeast corner of the warehouse, where the office and vault were situated, became so impaired by the cracking or leaning of the wall outwardly that it was deemed necessary to take it down, and it was taken down and rebuilt. Although there was no apparent settling of the ground in the immediate vicinity, nor any caving in, yet the wall seemed to fall from some cause from that point, and the claim is that it fell from the construction of this tunnel by some displacement of the surface, which was, perhaps, not apparent to the eye. You will also bear in mind that the evidence shows that further along, near the north end of the plaintiff's building, there was a caving in of the bank, so that the earth near, or perhaps immediately under, the wall was to some extent displaced. The wall fell down there and was subsequently rebuilt, and the building repaired to some extent. You have heard all the testimony in regard to the extent of the repairs and the manner in which the building was left, and it is for you to say whether the
64 building was substantially restored to its original condition by the repairs which were made, so that the plaintiff, on the removal of the coffer-dam, and the other obstructions to the access to the property, could again enter into the enjoyment of his property as fully as before. If you are satisfied that the building was not so far repaired as to make it as useful for the plaintiff's purposes as it was before these injuries occurred, then the plaintiff will be entitled to recover such damages as would make it as useful for his purposes."]

To all that part of the charge from and including the words "there is left, however," to and including the words "make it as useful for his purposes," the plaintiff then and there duly excepted, the portion so excepted to being enclosed in brackets.

"The plaintiff's title is by a lease, as has been stated, and while there is no express provision in the lease, or right on the part of the tenant to take away the building on the termination of the lease, there is no covenant on the part of the landlord to keep the building in repair; but I think a fair construction of the whole lease, together with the general law in relation to fixtures between landlord and tenant, taken in connection with the evidence in the case, shows that this building was a fixture, and was treated as such between the lessor and lessee. It seems that this building was constructed several years prior to the
65 making of the lease which was in force at the time this injury occurred, and was constructed by the plaintiff under some former lease. The plaintiff occupied these buildings with no covenant on the part of the landlord to keep them in repair, and I charge you that the building in question was a fixture which the plaintiff had a right to consider as its own as between themselves and any person committing an injury upon it, which would include the defendant, if they did commit an injury upon it. It is for you to say, in the light of the testimony in this case, whether the building in question sustained any damage by reason of the negligence or unskilfulness on the part of the defendant or the contractors under the defendant, in the construction of the tunnel; and if it did, then the plaintiff will be entitled to recover such damages as the proof in the case shows you these damages amounted to.

"A point has been made that the defendant, being a foreign corporation, is not entitled to hold property in this State. I simply charge you upon that question, it being purely a question of law, that the plaintiff had the right to occupy and hold, as lessee or otherwise, such property as was necessary or convenient for the transaction of its business.

"A further point has been made that the plaintiff itself was not damaged by the exclusion from these premises, but Diffendorf, 66 the agent of the plaintiff. That point, however, is pretty much done away with by the ruling I have given in regard to the main element of damage. Still, however, there is something left of it, perhaps, and it is enough to say that the evidence shows that Diffendorf was a mere sub-tenant of the plaintiff, and that the company has settled with Diffendorf in some manner for whatever damages he sustained, and that the plaintiff was the owner of the building. I don't think that that question cuts any figure in the consideration of the question of damages, which is simply the damages on the building by reason of the negligence, if any, on the part of the defendant.

"In considering this question of negligence you should take into account all the circumstances of the case. The evidence on the part of the defendant tends to show that they braced this cut as thoroughly as they thought the necessity of the case demanded; but the evidence also shows that notwithstanding such bracing it fell through in one place or caved in, and the question arises whether, under the circumstances, the mere fact that it caved in does not show that there was some negligence somewhere. The fact that an accident occurs out of the ordinary course of events is usually evidence that somebody is to blame; that somewhere there has been negligence. It was evidently the intention of these contractors and of the engineers in charge 67 of this work that this embankment should be kept in an upright position, and they expected that they had resorted to means and instrumentalities sufficient to so maintain it. It is equally clear that some part of the embankment, notwithstanding these precautions, did fall in, and thereby the part of this wall was broken. The evidence in regard to the settling of the southeast corner where the vault was located is not so clear, but at the same time the concurrent settling away of this wall with the progress of this work is a circumstance to be taken into account by you in determining whether or not the excavation was the cause of this giving way of the wall at the southeast corner. If you are satisfied that it was, then the question is whether there was any unskilfulness or want of care in that regard, or whether it was one of those phenomena or occurrences which no precaution could have guarded against; whether any bracing across the pit at that point would have prevented this adjacent wall from being to some extent affected. You must pass upon that, gentlemen, in the light of the evidence; the court cannot help you any more than to call your attention to the fact.

"With these directions as to the elements which you are to consider I will just simply add that if you are satisfied that the plaintiff 68 has made out a cause for the recovery of damages by reason of want of skill or care in the conduct of this work your verdict will be: 'We, the jury, find the defendant guilty, and assess the damages at so much.' If you are satisfied there was due care and skill in the management of this work and that these injuries are unavoidable in the conduct of such a work—that is, the falling of these walls could not have been avoided by due skill, then you will simply say, 'We, the jury, find the defendant not guilty.'"

Mr. WAITE. "In addition to what I have already asked, I will ask the court to instruct the jury that even if the city be entitled to lay a coffer-dam along across the river, they had no right to lay the coffer-dam in front of the plaintiff's lot and dock, and for any damages which the plaintiff may have suffered by the coffer-dam being in front of their dock it is entitled to recover in this action;" which the court refused to give, to which refusal the plaintiff then and there excepted, and further charged the jury as follows:

THE COURT. [I refuse that, always assuming that the proof shows that the coffer-dam was a necessity. I look upon the river just as I do the street. They have the same right to go onto the river and construct a coffer-dam in order to complete this work that they have to go onto a street and put down a track or any other work which is necessary in order to carry on improvements.]

69 To all that part of the charge from and including the words "I refuse that" to and including the words "carry on improvements" the plaintiff then and there duly excepted, that portion so excepted to being enclosed in brackets.

M'r Dickey, counsel for the defendant, then and there asked the court to charge the jury, so far as the settling of the walls of the building is concerned, that while it was the duty of the defendant to protect their work so that the weight of the natural earth of the plaintiff's lot could not have caved in, they were not bound to protect themselves against the effect of the weight of the wall of the building; that if the jury believe from the evidence that the sinking was caused by the weight of the wall, which otherwise would not have occurred, that the defendant is not liable for that.

THE COURT. [I will say to the jury that if you are satisfied from the evidence that the sinking of this wall, or rather the cracking of the wall, was due to the weight of the walls upon the selvage or portion of the earth which was left, and not to the removal of the material which were taken out of the street, that is from the pit, then the defendants would not be liable. If you are satisfied that if the wall had not stood upon the plaintiff's lot at the place where it did there would have been
70 no change in the level of the ground there, but that the change in
the level which caused the deflection of the wall was caused by the weight of the wall resting upon the earth after the excavation was made, then the defendant is not liable. The principle is precisely like two adjacent owners, one man building a building and sinking his foundation four feet into the ground, the adjoining owner may think it is necessary for him to set his six or ten feet into the ground and he excavates for that purpose. Now, if the first wall built, by reason of its own weight, causes the earth to crush or cave away after the excavation below there has been made upon the adjoining lot, the owner of the adjoining lot making the deeper excavation is not liable. Each man, in other words, must look out for his own foundation.]

To all that part of the charge from and including the words "I will say to the jury" to and incuding the words "for *its* own foundation," the plaintiff then and there duly excepted, that portion of the charge excepted to being included in brackets. To the refusal to give each of the prayers or instructions asked for by the plaintiff, the plaintiff then and there duly excepted, and the plaintiff then and there duly excepted separately to each part of the above charge inclosed in brackets. And forasmuch as the matters above set forth do not fully
71 appear of record, the plaintiff tenders, this its bill of exceptions,
and prays that the same may be signed and sealed by the judge pursuant to the statute in such case made, which is done accordingly.

H. W. BLODGETT, *Judge.*

(Endorsed:) Filed July 13, 1875. W'm H. Bradley, cl'k.

And afterwards, to wit, on the 27th day of May, A. D. 1876, said plaintiff filed in said clerk's office its bond in appeal in said entitled cause, which said bond is in the words and figures following, to wit:

Appeal bond.

Supreme Court of the United States.

NORTHERN TRANSPORTATION COMPANY OF OHIO
vs.
CITY OF CHICAGO.

Know all men by these presents that we, The Northern Transportation Company of Ohio and Robert Diefendorf, of Chicago, Illinois, are held and firmly bound unto the city of Chicago in the sum of five hundred dollars, to be paid to the said city of Chicago, its legal representatives; to which payment, well and truly to be made, we bind ourselves and each of us jointly and severally, and our and each of our heirs and legal representatives firmly by these presents, sealed with our seals, and dated this 27th day of May, A. D. 1876.

72 Whereas the above named The Northern Transportation Company of Ohio hath presented a writ of error to the Supreme Court of the United States to reverse the judgment rendered in the above-entitled action by the circuit court of the United States for the northern district of Illinois:

Now, therefore, the condition of this obligation is such that if the above-named Northern Transportation Company of Ohio shall prosecute its said writ of error to effect and answer all costs if it shall fail to make good its plea, then this obligation shall be void; otherwise to remain in full force and virtue.

ROBERT DIEFENDORF. [SEAL.]
NORTHERN TRANSPORTATION CO. OF OHIO, [SEAL.]
By R. DIEFENDORF, *Ag't.*
THE NORTHERN TRANSPORTATION COMPANY OF OHIO,
By A. W. FRENCH, [SEAL.]
Its Secretary.

Who has also here affixed as such secretary the corporate seal of such company.

Approved.

H. W. BLODGETT, *Judge.*

(Endorsed:) Filed May 27th, 1876. W'm H. Bradley, clerk.

73 NORTHERN DISTRICT OF ILLINOIS, *ss:*

I, William H. Bradley, clerk of the circuit court of the United States for said district, do hereby certify the above and foregoing to be a true, correct, and complete transcript of the record of all the proceedings had in said court in the cause wherein the Northern Transportation Company of Ohio is the plaintiff, and the City of Chicago is the defendant, as the same appears from the files and records of said court now remaining in my custody and control.

In testimony whereof I have hereunto set my hand and affixed the seal of said court, at my office in Chicago, in said district, this 20th day of June, A. D. 1876, and of our Independence the 100th year.

[SEAL.] W'M H. BRADLEY, *Clerk.*

74 The United States of America to the judges of the circuit court of the United States for the northern district of Illinois, greeting:

Because in the record and proceedings, as also in the rendition of a judgment in a plea which is in said court before you between the Northern Transportation Company of Ohio, plaintiff, and the city of Chicago, defendant, a manifest error hath happened to the great damage of the said The Northern Transportation Company of Ohio, as by its complaint appears; and it being fit that the error, if any there hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf; you are hereby commanded, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October next, in the said Supreme Court to be then and, there held, that the record and proceedings being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the law and custom of the United States should be done.

Witness the Hon. Morrison R. Waite, Chief Justice of the Supreme Court of the United States, this twenty-seventh day of May, A. D. 1876.

[SEAL.] W'M H. BRADLEY,
Clerk of the Circuit Court of the United States
for the Northern District of Illinois.

75 UNITED STATES OF AMERICA, *ss:*

To the City of Chicago, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the second Monday of October next (1876), holden at Washington City, in the District of Columbia, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the northern district of Illinois, wherein the Northern Transportation Company of Ohio is the plaintiff, and you are defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness the honorable Henry W. Blodgett, presiding judge of the circuit court of the United States for the northern district of Illinois, this 27th day of May, A. D. 1876.

H. W. BLODGETT, *Judge.*

(Indorsed:) U.S. Supreme Court. Northern Transportation Company of Ohio v. City of Chicago. Citation.

Service accepted by copy this June 2d, 1876.

R. S. TUTHILL,
Att'y for City of Chicago.

76 Supreme Court of the United States. October term, A. D. 1876.

NORTHERN TRANSPORTATION COMPANY OF OHIO
vs.
THE CITY OF CHICAGO.

Error from the circuit court of the United States within and for the northern district of Illinois:

And now comes the plaintiff in error, the Northern Transportation Company of Ohio, by R. P. Spalding and Horace F. Waite, its attorneys, and says that in the record and proceedings aforesaid, and in the giving of the judgment aforesaid, there is manifest error in this, to wit:

First. The court below erred in refusing each of the instructions specially asked for on the trial of this case by the plaintiff below, being the plaintiff in error.

Second. That the court erred in the charge given to the jury on the trial and in ruling and deciding upon the law in the instruction given by the court to the jury.

Third. The court below erred in its instruction to the jury, and especially did the court err in each of the instructions given to the jury, which were by the plaintiff below, and being the plaintiff in error duly excepted to, and which appear by the bill of exceptions to have been duly excepted to.

Fourth. The court below erred in refusing to give each of the instructions asked for, numbered from one to seven, inclusive, by the plaintiff in error.

77 Fifth. The court erred in withdrawing, as it did withdraw, from the consideration of the jury the plaintiff's claim for damages, and the court also erred in instructing the jury that the plaintiff could not recover for the same.

Sixth. The court erred in deciding that the plaintiff could not recover for the damages claimed and proved by it below by reason of the obstruction by the defendant of the Chicago River, and in withdrawing, as it did, all such damage from the consideration of the jury.

Seventh. That the court erred in its charge to the jury on the trial below in each of the several particulars excepted to by the plaintiff in error on the trial.

Eighth. That the court below erred in deciding the law of the case to be with defendant in error, and in so instructing the jury.

Ninth. That the court below should have instructed as asked by the plaintiff in error, and not as asked by the defendant in error.

Tenth. That the court erred in its instructions to the jury on the trial.

Eleventh. That the court erred in each and every of the instructions given to the jury on the trial of the case.

Twelve. That the court admitted improper evidence in favor of the defendant on the trial.

Thirteenth. That the court refused on the trial to admit proper evidence offered in behalf of the plaintiff in error.

78 Fourteenth. That the court erred in refusing the plaintiff in error a new trial.

Fifteenth. That the judgment should have been for the plaintiff in error, and not for the defendant in error.

Sixteenth. That the circuit court erred in refusing the first instruction asked by the plaintiff in error.

Seventeenth. That the circuit court erred in refusing the second instruction asked by the plaintiff in error.

Eighteenth. That the circuit court erred in refusing the third instruction asked by the plaintiff in error.

Nineteenth. That the circuit court erred in refusing the fourth instruction asked by the plaintiff in error.

Twentieth. That the circuit court erred in refusing the fifth instruction asked by the plaintiff in error.

Twenty-first. That the circuit court erred in refusing the sixth instruction asked by the plaintiff in error.

Twenty-second. That the circuit court erred in refusing the seventh instruction asked by the plaintiff in error.

Twenty-third. That the circuit court erred in charging the jury, as it did charge the jury, from and including the words "It is conceded that La Salle street extends" to and including the words "for the purpose of this case," the charge so assigned for error being the
79 part enclosed in brackets, commencing towards the bottom of
the 54th page of the manuscript record and ending on the 55th page.

Twenty-fourth. That the court erred in charging the jury as follows: "I shall deem it my duty to withdraw from your consideration a large portion of the claim which the plaintiff has made against the defendant in this case, as I hold the law to be well settled, and so charge you as the law of this case, that the defendant had the right under the law to enter upon La Salle street, and make such public improvements as in the judgment of the city authorities was necessary to construct the tunnel in question."

Twenty-fifth. That the court erred in instructing the jury as follows: "And I further instruct you that they also had the right, for that purpose, to enter upon the portion of the river in front of the plaintiff's lot, and construct the coffer dams there, if it was necessary in order to enable them to construct the tunnel."

Twenty-sixth. The court erred in instructing the jury as follows: "That the plaintiff took its lot subject to the right of the city to make these necessary public improvements in the streets.' That the method of crossing the river at this point was one to be determined by the city authorities. They could decide whether they would cross or have
80 the public cross the river by a ferry, by a bridge, or by a tunnel,
and when they had determined to effect the crossing by a tunnel, they had a right to use and occupy so much of the street as was necessary to construct the tunnel, using due skill and care and despatch always in doing it, so as not unnecessarily to interfere with private property."

Twenty-seventh. The court erred in instructing the jury as follows: "That although the plaintiff may, for the time being, have been deprived of the beneficial use of his property by such entry upon the street, although access to the property through the street may have been practically prevented by the occupation of the street for the purpose of constructing the tunnel, and although access to the lot from the river may have been partially prevented during this time, yet these were incidental inconveniences to which the plaintiff, as the owner of this lot, must submit, in order that the public may be accommodated by the construction of this tunnel; that the city had the same right to enter upon the river for the purpose of erecting works there to facilitate the con struction of the tunnel that it had to enter upon the street and con

struct the tunnel itself, always, however, subject to the condition that
they should not unnecessarily or negligently injure the plaintiff."
81 Twenty-eighth. And the court erred in the following portion of
the last instruction: "And although access to the lot from the river may have been partially prevented during this time, yet these were incidental inconveniences to which the owner of the lot must submit."

Twenty-ninth. The court erred in charging the jury from and including the words "There is left, however," at the bottom of the 62d page of the manuscript record, to and including the words "make it as useful for his purposes," on the 64th page of the manuscript.

Thirtieth. That the court erred in refusing to charge the jury as follows: "I will ask the court to instruct the jury that even if the city be entitled to lay a coffer-dam along across the river, they had no right to lay the coffer-dam in front of the plaintiff's lot and dock, and for any damages which the plaintiff may have suffered by the coffer-dam being in front of their dock, it is entitled to recover in this action."

Thirty first. And the court erred in refusing to charge the jury as asked for, as set forth in the last assignment of errors, and, in so refusing, in charging the jury as follows: "I refuse that, always assuming that the proof shows that the coffer-dam was a necessity. I look upon
the river just as I do the street. They have the same right to g'
82 onto the river and construct a coffer-dam, in order to complete
this work, that they have to go into a street and put down a track or any other work which is necessary in order to carry on improvements."

Thirty-second. The court erred in charging the jury, as it did charge the jury, in the words from and including "I will say to the jury," on the 69th page of the manuscript record, to and including the words "for its own foundation," on the 70th page of the manuscript record.
83 Therefore, in that there is manifest error, and this it is ready
to verify; wherefore the Northern Transportation Company of Ohio, plaintiff in error, prays that the judgment aforesaid, for the error aforesaid, may be revoked, annulled, and altogether held for nothing, and that it may be restored to all things which it hath lost by or on occasion of the judgment aforesaid, &c.

RUFUS P. SPALDING,
HORACE F. WAITE,
Att'ys for Plaintiff in Error.

(Indorsement on cover:) No. 144. The Northern Transportation Company of Ohio, plaintiff in error, vs. The City of Chicago. N. Illinois C. C. U. S. Filed 6th September, 1876.

No. 144.

IN THE

Supreme Court of the United States.

The Northern Transportation Company of Ohio,
PLAINTIFF IN ERROR,
vs.
The City of Chicago,
DEFENDANT IN ERROR.

Error to the Circuit Court of the United States for the Northern District of Illinois.

BRIEF FOR PLAINTIFF IN ERROR,

By R. P. Spalding.

November, 1878.

In the Supreme Court of the United States.

DECEMBER TERM, A. D. 1878.

THE NORTHERN TRANSPORTATION COMPANY, OF OHIO,
Plaintiff in Error,
vs.
THE CITY OF CHICAGO.

Error to the Northern District of Illinois.

Brief for Plaintiff, by Mr. Spalding.

STATEMENT OF THE CASE.

The Plaintiff is a body corporate under the laws of the State of Ohio, and, in the years 1869 and 1870, was extensively engaged in the business of transporting freight and passengers, by a line of Steam Propellers, between Ogdensburgh, on the River St. Lawrence, and the City of Chicago, on Lake Michigan, touching at intermediate ports. There were fourteen of these steamers running in said line during the years aforesaid, and, on an average, five of them arrived at and departed from the port of Chicago, each week, during the season of navigation.

The Plaintiff had a ground lease, from one Timothy Wright, of lot number one in block number four, in the original town of Chicago, Cook County, Illinois, with the dock and wharfing sites and privileges, from April 1st, 1867, to April 1st, 1877, at an annual rental of $3,450, payable quarterly. (See plat on page 21 of printed record.) Upon this leased ground, which had a frontage of eighty feet upon the north bank of the Chicago river, a navigable stream running into Lake Michigan, and was bounded on the east by North La Salle Street, the Plaintiff had erected a suitable warehouse and shed, at an expense of $17,000.

This warehouse was situated in close proximity with the river, on the south end of lot No. 1, and near the intersection of North La Salle Street with said river. It contained the business office of the Company, in the city of Chicago, and accommodations for the freight and passengers received from, or transmitted through their Steam Propellers, which uniformly lay at their dock, in front of said warehouse, until the interruption hereinafter mentioned. While the Plaintiff was thus in lawful and peaceable possession of said premises, and pursuing its ordinary occupation of a Transportation Company upon the lakes and navigable waters connected therewith, to-wit: on or about the first day of November, 1869, the Defendant commenced the construction of a tunnel under and across the said Chicago river, from the foot of North La Salle Street, adjacent, on the east, to the premises of Plaintiff. In order to prosecute this work successfully, it became necessary to excavate the whole of North La Salle Street, and the Defendant did, in fact, excavate said street, from the river north to Michigan Street, which is the third street from said river, running parallel with the same, and so obstructed said street during the time said tunnel was in course of construction that the Plaintiff could have no access to its warehouse by means of the same.

It also became necessary to construct—and the Defendant did in fact construct—a coffer-dam, extending from a point thirty feet west of the east end of Plaintiff's dock nearly across the river, thus preventing the approach to Plaintiff's dock and warehouse of the Steam Propellers above mentioned, and other vessels coming in from the lake and desiring to discharge their freight and land their passengers at that point. These various obstructions in the street and river broke up the business of the Plaintiff in the fall of 1869, and prevented its resumption at the same point until the completion of the tunnel, which was some time in

August, 1870. The Plaintiff, by reason of these impediments, was forced to hire another warehouse and another dock at points lower down the river, and such premises could not be obtained for a less term than a year.

The proof shows that by reason of the obstructions placed in North La Salle Street and in the Chicago River adjacent to the premises of Plaintiff, by the City of Chicago, in the fall of 1869 and in the spring and summer of 1870, a special injury accrued to the Plaintiff of at least $7,837, in amount. Suit was brought in the Circuit Court to recover damages to this extent, but the Judge charged the jury, substantially, that the act of the city in obstructing the street and river while making a tunnel for the convenience of the public, was "*damnum absque injuria.*"

I object to this charge for the following reasons:

1. The Constitution of the United States authorizes Congress to regulate commerce "among the several States." The power to regulate commerce extends to navigation.

Gibbons vs. Ogden, 9 Wheaton 1.
State of Penn. vs Wheeling Bridge Co.,
13 Howard 518.

My first proposition, then, is that the Chicago river, being a navigable stream, was under the control of Congress, which alone has power "to regulate commerce among the several States," and the City of Chicago could not interrupt the flow of the water without being responsible in damages, for any special injury sustained thereby, by individual citizens of the United States who were prevented from using the stream for purposes of navigation.

"Prerogative rights are held for the benefit of the community, "more especially those charged with the common use, *as royal* "*rivers.*"

Chittys Prerog. 4.
4 Term Rep. 410.
16 Peters U. S. Repts. 367.

"None but the sovereign power can authorize an interruption of such passages (the passage of boats or other craft over a navigable creek), because this power alone has the right to judge whether the public convenience may be better served by suffering bridges to be thrown over the water, than by suffering the natural passages to remain free."

Commonwealth vs. Charleston,
1 Pickering's Rep. 184.

In the case of The Inhabitants of Arundel vs. McCullough, 10 Mass. Rep. 70, it was expressly decided that "all navigable "waters belong to the public, and that no individual *or corpora-* "*tion* can appropriate them to their own use, or confine or obstruct "them, so as to impair the passage over them without authority "from the legislative power." * * * * * * * * * *

In the above case, the Court of Sessions in 1771 had authorized the laying out of a road across the river, and a bridge had been erected under that authority. The Defendant removed the bridge to facilitate the passage of his vessel, and the Court decided that he had a right to do so, and non-suited the Plaintiff.

These waters within the influence of the ordinance of 1787.

2 But if it be urged that the Legislature of Illinois had directly or indirectly sanctioned the construction of this tunnel, then I reply that the ordinance of 1787 for the government of the Northwestern Territory, of which Illinois formed a part, declares that "the navigable waters leading into the Mississippi and St. "Lawrence, and the carrying places between the same, shall be "common highways and forever free, as well to the citizens of said "Territory as to the citizens of the United States, and those of "any other State that may be admitted into the Confederacy."

It was decided, in Hogg vs. the Zanesville Canal and Manufacturing Co., 5 Ohio Rep. 410, that the State cannot lawfully impede or obstruct the navigation of these rivers, *nor can the Legislature* authorize another to do so. In rendering this decision, the venerable Judge Hitchcock uses this emphatic language: "How is the case before the Court? Here was a public highway, "made, not by the 'Zanesville Canal and Manufacturing Company,' "but by the Supreme Creator of all things. The plaintiffs had a "right secured to them by the supreme law of the land to travel "this highway, and to transport their property upon it without the "let or hindrance of any man or body of men. This right was "obstructed by the defendants, or in consequence of their acts "originally done. This obstruction they at the time would have "been glad to have removed, and made efforts to remove, but "could not, owing to circumstances not within their control. But "they voluntarily erected the works which were the first cause of "the obstruction, *and must be liable for all consequences.* It "may be a hard case for them, but it would be equally, nay, more "hard to throw the risk upon those *whose constitutional rights, "secured by compact, had been interfered with.*"

See also Article 2 of the articles of compact in said ordinance of 1787, which provides that "no man shall be deprived of his property without compensation," etc , etc.

Chase's Statutes of Ohio, vol. 1, p. 68

THE CONSTITUTION OF THE UNITED STATES, in Article 5 of the Amendments, provides that no person shall be deprived of life, liberty *or property*, without due process of law, nor shall private property be taken for public use without just compensation.

The Constitution of the State of Illinois, adopted in 1818, contains in Article 8 and Section 12 this provision:

"Every person within this State ought to find a certain "remedy in the laws *for all injuries* or wrongs which he may "receive in his person, *property* or character."

The Constitution of 1848 contains the same words in Article 13 and Section 12.

The Constitution of 1870 contains the same words in Article 2 and Section 19.

And yet, with all this array of organic law staring him in the face, the Judge presiding in the Court below charged the jury in these words:

"The Plaintiff in this case may have been excluded from the "enjoyment of his property eight months. The ordinary citizen, "by the laying of water pipes, may have been excluded only for "a week or a day from the convenient access to his premises, but "it is the same kind of injury and only greater in degree. *It is* "*not a taking of the Plaintiff's property for public uses.* It is "only subjecting him to inconvenience for the time being by the "construction of public works, and as such *it is one of the inci*-"*dents to owning a lot in the city* abutting upon a street and "upon navigable water. As I said before, this excludes from "your consideration, therefore, the main element of damage which "the Plaintiff has put in evidence here, that is, the expense of "hiring other premises upon which to carry on its business "during the season of 1870."

I feel constrained to say that this was not law in Illinois at the time the injury was committed, for I find in Mortimer Nevins vs. the City of Peoria, decided in the Supreme Court in 1866, and reported in the 41st Illinois Rep. 502, a query propounded by Justice Lawrence in language that commends itself to every man's sense of right: "If the public interest requires that the lot of an "individual shall be rendered unfit for occupancy, either in whole "or in part, in this process of grading or drainage, why should "*not the public pay for it to the extent to which it deprives the* "*owner of its legitimate use?*"

This question can never be satisfactorily answered by those who claim, as many have done in times past, that it is "one of the incidents to a city life" to have your property rendered useless whenever the municipal authorities see fit to obstruct all means of access thereto, without making to you any remuneration therefor. It is a *wrong*, indeed, they say, but "*there is no remedy!!!*"

Mr. Justice Lawrence in giving the judgment of the Court in Nevins vs. the City of Peoria, says in continuation of the above: "Why does not the constitutional provision apply as well "to secure the payment for property partially taken for the use or "convenience of a street as when wholly taken and converted into "a street? Surely the question of the degree to which the prop-"erty is taken can make no difference in the application of the "principle. To the extent to which the owner is deprived of its "legitimate use, and as its value is impaired, to that extent he "should be paid. * * * * * In our opinion, the theory "that private rights are ever to be sacrificed to public convenience "or necessity, without full compensation, is fraught with danger "and should find no lodgment in American jurisprudence."

See also the City of Pekin vs. James F. Brereton et al., decided in 1873 and reported in 67th Illinois Rep. 477, in which the Supreme Court of the State recognize and sanction the doctrine laid down in Nevins vs. the City of Peoria, and Mr. Justice Breese, in pronouncing the opinion, says emphatically that in that case "this Court reached the conclusion that although a city "has power to elevate or depress the grade of its streets as it may "deem proper, yet, if, in so doing, it inflicts an injury upon a lot "owner peculiar to him alone, it cannot be exempted from liability. " * * * * This was under the Constitution of 1848, and is "based upon the well known and approved maxim of the Common "Law, 'so exercise your own rights as not to injure others.' "

"But the Constitution of 1870, in force when the injury of "which complaint is made was done, provides in the 'Bill of "Rights,' of Section 13 of the Second Article, that 'private prop- "erty should not be taken *or damaged* for public use without just "compensation. It will not be denied that this provision rests "upon a great principle of right and justice which would, doubt- "less, be applied by Courts in every proper case WITHOUT CONSTI- "TUTIONAL SANCTION. * * * * * * * * * * * * * "We are, as time advances, the more convinced of the justice of "the views announced by this Court, that in the exercise of "power conferred upon a municipal authority *private rights must* "*be regarded*, that individual property is not at the mercy of "municipal power."

I am aware of the multitudinous array of authorities, state and national, that can be produced in support of the doctrine that "the authorities of a city have the undoubted right to alter "the grades of streets at their discretion, and to compel the own- "ers of property to conform thereto, and if this is done with "reasonable care and diligence, *no* liability arises from their acts."

It was so decided by the Supreme Court of Illinois in Roberts vs. the City of Chicago, at April Term, 1861.

26 Illinois Rep. 249
S. P. 20 Howard U. S. Rep. 135
18 Penna. State Rep. 187

I cite these three cases because they exemplify in full force the character of that class of authorities, which obtained for a time in these United States, but which are, happily for the people, being fast put to rest by improved judicial discrimination, as well as by increased respect for PRIVATE RIGHTS.

The Courts of Ohio, by a long time of decisions, has settled this question upon just principles, to-wit:

"That municipal corporations, after once establishing a grade "for a street, can make no change to the special injury of a lot-"holder, who has adjusted his building to that grade, without "incurring the liability to make full compensation for the injury."

10 Ohio Rep. 160
18 do 229
7 Ohio State 459
14 do 523
16 do 163
21 do 499
30 do 133

In the State of Pennsylvania, I find a clause inserted in the new Constitution adopted in 1874, that will hereafter prevent so great an outrage upon private rights, as that which caused the learned and upright Judge who gave the opinion in O'Conner vs. Pittsburgh, "*to grieve that he could discover no way to relieve the plaintiff.*" It is this:

ARTICLE 16.

"Sec. 8.—Municipal and other corporations and individuals, "invested with the privilege of taking private property for public "use, shall make just compensation for property taken, *injured* or "destroyed by the construction or enlargement of their works, "highways or improvements, which compensation shall be paid or "secured before such taking, injury, or destruction."

So, again, the Constitution of Illinois adopted in 1870, has the following prohibition in the "Bill of Rights :"

ARTICLE 2.

"Sec. 13.—"Private property shall not be taken *or damaged* "for public use, without just compensation. Such compensation, "when not made by the State, shall be ascertained by a jury as "shall be prescribed by law."

This Constitution was framed, in Convention, in the month of May, and was declared to be in force from and after the 8th day of August, 1870.

The case reported in 83 Illinois 525, shows that Plaintiff is entitled by virtue of this new Constitution, to recover damages for any injury sustained after that instrument took effect.

"As time advances," (says Mr. Justice Breese, in 67 Illinois "477), we are the more convinced that in the exercise of power, "conferred upon a municipal authority, *private rights must be* "*regarded; that individual property is not at the mercy of muni-* "*cipal power ! ! !*"

There is a striking difference in the decisions of this honorable Court, from Smith vs Corporation of Washington, decided in 1857, 20 Howard 135, to Pumpelly vs. Green Bay Company, decided in 1871, 13 Wallace 166.

Among the head-notes to this last decision, I feel a commendable degree of pride in being able to transcribe the following:

"3. By the general law of European Nations, and the Com- "mon law of England, it was a qualification of the right of emi- "nent domain, that compensation should be made for private "property, taken or sacrificed for public use.

"4. And the constitutional provisions of the United States, "and of the several States, which declare that private property "shall not be taken for public use without just compensation, "were intended to establish this principle beyond Legislative "control."

"5. It is not necessary that property should be absolutely "*taken*, in the narrowest sense of that word, to bring the case "within the protection of this Constitutional provision. There "may be such serious interruption to the common and necessary "use of property as will be equivalent *to a taking*, within the "meaning of the Constitution."

In East Hartford vs. Hartford Bridge Co., 10th Howard 535, this honorable court speaking through Mr. Justice Woodbury uses the following language:

"In Goszler vs the Corporation of Georgetown, 6 Wheaton "596-598 it was held that a city with some legislative power as "to by laws, streets, &c., could, after establishing a graduation "for its streets, and after individuals had built in conformity to "it, change materially its height."

"This case appears to settle the principle that a Legislative "body cannot part with its powers, by any proceeding, so as not "to be able to continue the exercise of them. It can and should "exercise them, again and again, as often as the public interests "require."

"And, *though private interests may intervene, and then "should not be injured, except on terms allowed by the Con-"stitution;* yet public interests in one place or corporation, may "be affected injuriously, by laws, without any redress, &c.

From this opinion it will appear, as I have always maintained, that the Supreme Court of the United States never intended to decide anything more in Goszler vs. the Corporation of Georgetown (6 Wheaton 593) than, that, "the power of the city to grade the streets was a continuing power, and could be exercised as often as public convenience required it." I take no exception to that decision. But it further appears from this opinion of Justice Woodbury, that if in the continued exercise of this power *private interests receive detriment,* the municipality can only be absolved from responsibility by adhering to the provisions of the Constitution.

The Fourteenth Amendment to the Constitution of the United States is as follows:

"All persons born or naturalized in the United States, and "subject to the jurisdiction thereof, are citizens of the United "States and of the State where they reside.

"No State shall make or enforce any tax which shall abridge "the privileges or immunities of citizens of the Uhited States. "*Nor* SHALL ANY STATE DEPRIVE ANY PERSON OF LIFE, LIBERTY OR "PROPERTY WITHOUT DUE PROCESS OF LAW, nor deny to any person "within its jurisdiction, the equal protection of the laws."

It would seem as if this constitutional interdiction was decisive of the case at bar, if it be conceded that "Pumpelly vs. Green Bay Company" is recognized as sound law, to wit: "That "there may be such serious interruptions to the common and "necessary use of property as will be equivalent to *a taking* "within the meaning of the constitution."

In his dissenting opinion in the "SLAUGHTER HOUSE CASES," 16 Wallace 121, Mr. Justice Bradley makes this pertinent inquiry: "Can the Federal Courts administer relief to citizens of the United "States, whose privileges and immunities have been abridged "by a State? Of this I entertain no doubt. Prior to the Four"teenth Amendment, this could not be done, except in a few "instances, for the want of the requisite authority."

As a corollary, if a State shall deprive a person of the use of his property, I may insist that the Federal Courts, under the Fourteenth Amendment, may administer relief.

See also dissenting opinion of Mr. Justice Field, in Munn vs. Illinois, 4 Otto 142, in which he says: "If the Legislature of "a State, under pretence of providing for the public good, or for "any other reason, can determine, *against the consent of the "owner,* the uses to which private property shall be devoted, or "the prices which the owner shall receive for its uses, *it can "deprive him of the property* as completely as by a special act "for its confiscation or destruction. If, for instance, the owner is "prohibited from using his building for the purposes for which it "was designed, it is of little consequence *that he is permitted "to retain the title and possession."*

4 Upon the broad principles of the Common Law, as recognized in England for centuries, I maintain that the Plaintiff has a right of action against the city for the special injury sustained in the obstruction of the street and river, and the consequent deprivation of the customary use of its property.

"In the Year Books, 27 Hen 8th ch. 10 page 27, the Plaintiff declared that he used to have a way from his house to his close by the highway, "loyal chemin" to carry and recarry, &c, and the Defendant stopped the highway, so that the Plaintiff could not go in that part of it to his close, to his injury and damage.

There it was argued by *Baldwin C. J.* that the party should be punished only by presentment in the leet, for the common nuisance, and that if *one* could maintain an action *another* might, and so the party might be punished a hundred times for the same cause."

'On the other hand, it was said by *Fitzherbert J.*, that the man who makes the nuisance is punishable in the leet and not by action, *unless it be where a man has greater hurt or incommodity than every other man had*, but that he who had greater incommodity or hurt should have his action to recover for the especial hurt."

And so the law is laid down by Lord Coke. Co Lit. 56a.

Rose et al vs. Miles,
4 Maule & Selw., 101.

Mayor and Burgesses of Lyme Regis vs. Henly.
1 Bingh. New Rep, 222.

Wilkes vs. Hungerford Market Company,
2 Bingh. New Rep. 281.

In the United States, the following cases will support the principle for which I contend:

Baron et al. vs. The Mayor and City Council of Baltimore,

2 Amer. Jurist 203.

Stetson vs. Faxon,

19 Pickering's Rep., 147.

In this last case, Mr. Justice Putnam closes an opinion which is exhaustive of the subject, with this emphatic language:

——"And the long established rule of law which we enforce, is "not, we trust, to check the progress of public improvements. "*Let the city take from individuals all that is necessary, conve-"nient and becoming this great and flourishing Capital, but let "compensation go hand in hand with the public benefit.*"

Again. I insist that the Legislature of Illinois had no right to obstruct the highway, either on land or water, to the prejudice of individuals. Much less the municipal corporation of Chicago, acting under its authority. "In England the King himself cannot "give license to any to commit a nuisance."

Viner, *Nuisance* F.

The right of the owner of adjoining land to the use of the highway *is as much property as the land itself.*——

Haynes vs. Thomas,

7 Indiana 38.

Bingham vs. Doane,

9 Ohio 165.

Protzman vs. R. R. Co.,

9 Indiana 467.

In conclusion, I respectfully submit to the Court, as the logical result of my argument, that the law is so, that, if the *public interest* in cities and towns, requires the property of an individual citizen to be sacrificed, either wholly or in part, to promote the convenience of the whole community, then *public justice* will require that community to compensate the individual for the injury he has sustained, beyond that of his fellow citizens in general, whether that injury be the taking or destruction of the property, or simply impairing its usefulness.

R. P. SPALDING,

Attorney for Plaintiff in Error.

United States Supreme Court.

NORTHERN GRAND DIVISION.

NORTHERN TRANSPORTATION COMPANY,
vs.
THE CITY OF CHICAGO.

NO. 144.
In Error to the Circuit Court of the United States, for the Northern District of Illinois.

BRIEF FOR THE PLAINTIFF IN ERROR.

WAITE & CLARKE,
For Plnintiff in Error.

CHICAGO:
THE CHICAGO LEGAL NEWS COMPANY, 47 & 49 DEARBORN STREET.
1878.

United States Supreme Court,

NORTHERN TRANSPORTATION COMPANY,
vs.
THE CITY OF CHICAGO.

NO. 144.
In Error to the Circuit Court of the United States, for the Northern District of Illinois.

BRIEF FOR THE PLAINTIFF IN ERROR.

This action was brought by the plaintiff in error to recover damages suffered by it under the following circumstances:

The plaintiff in error, and being the plaintiff below, was during the years 1869 and 1870, and long before, the owners of a line of propellers running between Chicago, in the State of Illinois, and Ogdensburg, in the State of New York. It had a ground lease from Timothy Wright of lot 1, block 4, in the original town of Chicago, Cook county, Illinois, with the dock and wharfing rights and privileges in front and connected therewith, from April 1st, 1867, to April 1st, 1877; for which plaintiff was to and did pay $3,450 rent to Wright per annum, which was payable quarterly. This lease was renewable for further terms at the rental of six per cent. per annum rent, upon the appraised value of the same. In addition to said sum the plaintiff, during the lease and its renewals, was to pay all taxes and water rents assessed on said premises.

Robert Diefendorf was at that time the plaintiff's agent of its line at Chicago, and had been such for more than eight years prior thereto. That on the first of November, A. D. 1869, the plaintiff was in possession of the premises, and had upon it a warehouse.

This warehouse was owned and had been constructed by the plaintiff, at a cost of $17,000, for the doing of the business of the plaintiff at Chicago, and it and the dock and wharf were used by the plaintiff for the loading and unloading the freight and passengers carried by its said propellers to and from said premises and the dock thereon; which building also contained an office for its use in the transaction of its business. That during the years 1869 and 1870 the plaintiff was not only the lessee of the lot, and the dock on the same, but was the owner of a large number of propellers. It owned and employed at that time thirteen or fourteen propellers, running to this dock and warehouse in the Line from Ogdensburg to Chicago. It had been so engaged for 22 or 23 years. It had five propellors arriving and departing each week to and from said premises. The lot so occupied abutted and fronted 80 feet on the Chicago river on the south, and 180 feet on LaSalle street on the east. The entire river front of the lot was docked. The lot on the North Side fronted on North Water street, along which ran the track of the Northwestern railroad. To the west of it was a dock and warehouse used by the steamers of the Grand Trunk railroad. The warehouse occupied the entire lot except this dock at the south end so fronting on the river, which was used for receiving and discharging freight and passengers from and upon plaintiff's steamers into and out of the warehouse.

While the plaintiff was so occupying said premises, the defendant, about November 1, 1869, commenced to build a tunnel across the Chicago River, at La Salle St., and continued so engaged till some time in the fall of 1870.

At the time the defendant commenced to build said tunnel, all the business of the plaintiff at Chicago was done at this dock and warehouse on these premises. That the plaintiffs had used this dock and premises for over twenty-two years—and ever since it had done business in Chicago. The Chicago River is navigable up to, and past said premises, by all boats navigating the lakes and rivers, and all propellers and vessels of every kind could, and did, load and unload, and land at said dock, except during the time plaintiff was prevented from so doing by the acts of the defendant while constructing said tunnel. In building the tunnel the city commenced on the east line of said lot, at the intersection of the river with it and LaSalle street, and drove piles in front of and against the dock front for about 40 feet, and extending out into the river about two-thirds of the way across.

They commenced to drive from the line of the dock into the river—and these piles were so driven to construct such coffer-dam by a pile driver located in the river in front of and alongside of said dock. In constructing the coffer dam two rows of piles were driven, enclosing the space taken for the coffer dam—one row against the front of the dock, and the others out into the river—so as to make a coffer-dam two-thirds across the river, directly in front of and against said dock. The space between the rows of piles was filled with earth.

This coffer-dam, thus constructed, remained until some time in August, 1870. The city commenced about Nov. 1, 1869, to excavate LaSalle St., and excavated the same north to Michigan St. Michigan St. is north of Kinzie, and Kinzie is north of North Water St. There were doors to the warehouse on North Water and LaSalle streets. After the city commenced to excavate LaSalle St., the plaintiff could not get into the warehouse at all, or upon the premises, except from North

Water street. After the city commenced the construction of the coffer-dam, and while it remained there, the plaintiff could not bring its boats up to the dock or premises, or land freight or passengers to or from its boats upon said dock and premises, and were compelled to and did, for the purposes of its business, rent and occupy other docks and sheds in Chicago. That they were compelled to get such dock solely by reason of the obstruction placed in the river by the coffer-dam of the defendant, and the building of the tunnel. In the fall of 1869, the plaintiff occupied a dock and shed just east of Rush St. bridge, on the north side of the river; and in the spring they procured and occupied a dock on the south side of the river, between Clark and LaSalle streets, and continued to occupy it till the coffer-dam was removed in August, 1870. The reason for the procuring such docks was the inability of the plaintiffs, during said time, to get its steamers to its own dock to discharge and receive passengers and freight from it by reason of the coffer dam and river obstructions placed there by the city.

That a fair rental value of the plaintiff's dock and warehouse, at the time said coffer dam was constructed and placed, there would be from $7,000 to $8,000 per annum. This would include the warehouse—but the warehouse would be of little or no value to rent without the dock and water front;—such property could not be rented separately, or from month to month, but is rented together by the year or season of navigation. Plaintiff paid $3,500 ground rent, for the lot, and taxes; the latter amounted to about $600 per annum, making $4,100 the cost of the ground lease. The interest on the value of the warehouse of the plaintiff at 10 per cent. amounted to $1,700 to $1,800 per annum. In addition, the insurance on the same was $300 a year. The plaintiff was so prevented access to and from said dock from the river by its steamers, from Nov. 1, 1869, to

Aug. 1, 1870, the latter being the date of the removal of these obstructions in the river so that the dock could be used. The plaintiffs were compelled to rent the dock which they were necessitated to procure to do their business for the entire year of 1870. Under the arrangement (covering the period of obstruction), by which Diefendorf acted as plaintiff's agent, he was to do all the plaintiff's business at Chicago, and for so doing, for such services, was to have the use of its building and dock by paying the ground rent, according to the lease, the taxes, insurance, and ten per centum interest on the cost of the building—he to pay all expenses of doing the business, and he was to receive for such services a compensation on the freight handled; the plaintiff all the time being in possession of the demised premises, under its lease and ownership. The docks and warehouses procured were very inconvenient, and the cost of doing the plaintiff's business was greatly increased, and Diefendorf was thereby put to much extra expense. After the obstructions were removed, plaintiff and Diefendorf had a settlement, and plaintiff paid him $7,837, on account of and for actual extra expenses he had been put to in thus renting the other docks and employing additional hands to do plaintiff's business, rendered necessary by such obstructions in front of plaintiff's dock. The items of such extra expense of $7,837 were produced, all of which were for rent for the other docks, except $2.900. By reason of such settlement, Diefendorf had no claim on any one for this loss or damage, but it belonged to plaintiff.

The plaintiff's office occupied the whole width of the south part of the building. In excavating for the tunnel, the office gave way at the southeast corner. The contractors on the tunnel braced it up, but it would not stand, and they took down 25 feet of the wall at the southeast corner. The whole wall on the east side was braced up. The falling was occasioned by the caving in by reason of the excavation on LaSalle street, made by the city for the tunnel.

The timbers used before the mason work was put in were not strong enough to hold the ground from caving in. The contractors rebuilt the wall of the warehouse which fell down, at their own expense. Afterwards a portion of the wall at the northeast corner fell in—occasioned by the excavation of the tunnel falling in, carrying with it the wall. This was also repaired by the contractors.

In the southeast corner of the warehouse was a brick vault. After the contractors repaired the wall, it fell; this and the east side of the building settled and cracked, and by such settling and cracking the building was greatly damaged. The inside walls through the whole 80 feet were cracked, and thrown out of line and damaged by the work done by the defendant. Such damage to the building was about $1,000.

These facts are undisputed in the case. The plaintiff offered evidence tending to show that the work was negligently and improperly done in the construction of the coffer-dam and tunnel, and injury resulted therefrom to the building. It was further proved that the plat of the original town was never acknowledged, as required by law. The only evidence offered on the part of the defense was testimony tending to show that the work was carefully done, and without unnecessary delay—that a coffer-dam such as was constructed was necessary for the building of the tunnel in question, and such obstructions were necessary while said work was progressing, and that the plaintiff could have access to a *portion* of its dock and warehouse while said work was in progress. A diagram of the lot, streets and dock and location of the coffer-dam, will be found at page 21 of the record. No proof was offered by the defendant to controvert the plaintiff's proof on page 18 of the record, that after the construction of the coffer-dam, and while it remained there the plaintiff could not bring its boats up to the dock or premises, or land freight and passengers to and from said dock and premises, and the plaintiff was compelled to and did rent and occupy other docks as above stated.

II.

ERRORS ASSIGNED.

First. The court erred in deciding that the plaintiff could not recover for the damages claimed and proved by it by reason of the obstruction placed by the defendant in the Chicago River, and in withdrawing, as it did, all such damage from the consideration of the jury.

Second. The court erred in withdrawing, as it did withdraw, from the consideration of the jury the plaintiff's claim for damages, and the court also erred in instructing the jury that the plaintiff could not recover for the same.

Third. That the court erred in instructing the jury as follows: "And I further instruct you that they also had the right, for that purpose, to enter upon the portion of the river in front of the plaintiff's lot, and construct the coffer-dams there, if it was necessary in order to enable them to construct the tunnel."

Fourth. That the court erred in refusing to charge the jury as follows: "I will ask the court to instruct the jury that even if the city be entitled to lay the coffer-dam across the river, they had no right to lay the coffer-dam in front of the plaintiff's lot and block, and for any damages which the plaintiff may have suffered by the coffer-dam being in front of its dock, it is entitled to recover in this action.

Fifth. And the court erred in refusing to charge the jury as asked for, as set forth in the last assignment of errors, and in so refusing, in charging the jury as follows: "I refuse that, always assuming that the proof shows that the coffer-dam was a necessity. I look upon the river just as I do the street. They have the same right to go into the river and construct a coffer-dam, in order to complete their work, that they have to go into a street and put down a track, or any work which is necessary in order to carry on improvements."

Sixth. That the Circuit Court erred in refusing the third instruction asked by the plaintiff in error, which was as follows:

"That the Chicago River is not only proved to be in fact a navigable river, but is declared such by law, and the city of Chicago cannot obstruct the same or materially obstruct the same in front of the plaintiff's dock, even if authorized by law to do so, without just compensation for any special damage which any person may suffer by reason of such obstruction.

Seventh. That the Circuit Court erred in refusing the fourth instruction asked by the plaintiff in error, which was as follows:

"If the jury find from the evidence in this case that the plaintiff's dock fronts on the Chicago River, and that previous to the acts complained of the propellers of the plaintiff had been in the habit of loading and unloading freight to and from said dock and running its boats to such dock, the Chicago River is, by the fact of its being so navigable, a public navigable river and that while the right of navigation is a right common to all, yet if the jury find that in the construction of the coffer-dam in front of the plaintiff's docks by the defendant, as proved by the witnesses in this case, the plaintiff has suffered special damages, not common to others navigating the river, or other property-owners along the river, for such special damages the plaintiff is entitled to recover in this action."

Eighth. That the Circuit Court in refusing the fifth instruction asked by the plaintiff in error, which was as follows:

"And the plaintiff further asks the Court to instruct the jury from the evidence in the case, that if they find that the plaintiff has sustained special damage by the building of the coffer-dam by the defendant in front of the plaintiff's dock and warehouse, as proved in the case, not common to all property owners or the public, the plaintiff can recover for the same in this action."

Ninth. That the Circuit Court erred in refusing the sixth instruction asked by the plaintiff in error, which was as follows:

"If the jury find from the evidence in the case that that the construction of the tunnel across the river on LaSalle street by the excavations in the street, as proved, in front of the plaintiff's warehouse, by the defendant, the plaintiff has sustained special damage not common to all property owners or the public, the plaintiff can recover for the same in this action."

Tenth. The Circuit Court erred in refusing the seventh instruction asked by the plaintiff, which instruction was as follows:

"The plaintiff asks the Court to further instruct the jury that if they believe from the evidence that the defendant, in the construction of said tunnel, placed obstructions in the river in front of the plaintiff's dock and warehouse, so that the plaintiff during the period in question was practically prevented access to and from the same by its propellers, to unload and load passengers and freight therefrom on its propellers, and that the plaintiff was during said time partially deprived of the beneficial use of its dock and warehouse from the river side thereof, then they are instructed to allow to plaintiff for such loss and damage as it has sustained thereby."

Eleventh. That the Circuit Court erred in charging the jury as follows:

"Taking, then, these conceded and established facts in the case, I shall deem it my duty to withdraw from your consideration a large portion of the claim which the plaintiff has made against the defendant in this case, as I hold the law to be well settled, and so charge you, as the law of this case, that the defendant had the right under the law to enter upon LaSalle street and make such public improvements as, in the judgment of the city authorities, were necessary, and to construct the tunnel in question.

Twelfth. That the Circuit Court erred in charging the jury as follows:

"And I further instruct you that they also had the right for that purpose to enter upon the portion of the river in front of the plaintiff's lot and construct the cofferdam there, if it was necessary in order to enable them to construct the tunnel."

Thirteenth. The Court erred in instructing the jury as follows: "That the plaintiff took its lot subject to the right of the city to make these necessary public improvements in the streets. That the method of crossing the river at this point was one to be determined by the city authorities. They could decide whether they would cross or have the public cross the river by a ferry, by a bridge, or by a tunnel, and when they had determined to effect the crossing by a tunnel, they had a right to use and occupy so much of the street as was necessary to construct the tunnel, using due skill and care and dispatch always in doing it, so as not unnecessarily to interfere with private property."

Fourteenth. The Court erred in instructing the jury as follows: "That although the plaintiff may, for the time being, have been deprived of the beneficial use of his property by such entry upon the street, although access to the property through the street may have been practically prevented by the occupation of the street for the purpose of constructing the tunnel; although access to the lot from the river may have been partially prevented during the time, yet these were incidental inconveniences to which the plaintiff, as the owner of this lot, must submit, in order that the public may be accommodated by the construction of this tunnel; that the city had the same right to enter upon the river for the purpose of erecting works there to facilitate the construction of the tunnel that it had to enter upon the street and construct the tunnel itself—always, however, subject to the condition that they should not unnecessarily or negligently injure the plaintiff."

Fifteenth. And the Court erred in the following portion of the last instruction: "And although access to the lot from the the river may have been partially prevented during this time, yet these were incidental inconveniences to which the owner of the lot must submit."

Sixteenth. The Court erred in charging the jury that "if you are satisfied, from the evidence, that the sinking of this wall, or rather the cracking of the walls, was due to the weight of the walls upon the salvage or portion of the earth which was left, and not to the removal of the material which was taken out of the street, that is from the pit, then the defendant would not be liable." This charge, with the context, which in no wise qualifies the same, and all of which was excepted to, will be found on the 29th page of the record.

Seventeenth. The court erred in refusing the plaintiff in error a new trial.

III.

ARGUMENT.

The Court erred in withdrawing from the consideration of the jury all the plaintiff's claim for damages claimed and proved by reason of the obstruction of the Chicago River. This is covered by the errors assigned, numbered one, two, three, four, five, six, seven, eight, ten, twelve, fourteen, and fifteen. The charge given by the Court is found on pages 23 to 29 of the record. The instructions asked on this point are to be found on pages 22 and 23, and being requests Nos. 3, 4, 5 and 7, and also on pages 28 and 29. It is a conceded fact in the case that the city built the coffer-dam, and that while it remained there the plaintiff could not bring its boats up to its dock or premises, or land freight and passengers to and from its boats upon said dock and premises, and was compelled to and did hire other docks by reason of such obstructions, and suffered large damages thereby. The Court below withdrew such damages from the jury, and instructed them, after thus withdrawing from their consideration all such damages so suffered by the plaintiff by reason of the obstruction of plaintiff's dock, etc., by the building and keeping such coffer-dam in front of and attached to plaintiff's dock in a navigable stream (see page 25), that the defendants, as a matter of law, had a right to do as they did and enter upon the river and build such coffer-dam and maintain it there till the completion of the tunnel. The only qualification put to such right being that such coffer-dam was *necessary* in order to enable the city to construct the tunnel. (Page 25, 28 and 29). It is unnecessary to here repeat the charges asked and refused and the instruction given—as they are fully repeated in the assignment of errors.

The whole question is one of substance—and if we are right, as we claim we are, the court below improperly withdrew from the consideration of the jury this claim of the plaintiff for these damages. That the plaintiff suffered such damages—that they were special damages suffered by it, not common to any other property owner—that they amount to many thousand dollars—and that they were the direct result of the act of the city in building and maintaining such coffer-dam in front of and adjoining plaintiff's dock—were not questioned in the Court below by the attorneys of the city, the *latter* claiming then, as we suppose they will claim now, and as the Court charged the jury, that the city had the legal right to do what they did, and occasion the damages suffered by the plaintiff, and that the plaintiff was without remedy. Although it is not in the record, we will argue the case on the theory that the Legislature of the State of Illinois authorized the City of Chicago to construct a tunnel across the Chicago River—at LaSalle street—and that a proper ordinance was passed by the city to build such tunnel. We say, even all this being so, the City of Chicago is responsible for these damages thus suffered by the plaintiff on account of the obstruction of its dock front, and the Court should have so charged the jury. In this part of the argument, we shall alone consider the right of the plaintiff to recover for the damages resulting from its being deprived of the use of the Chicago River, and of access to its dock front. The right to the use of a navigable river, and to recover damages resulting from its obstruction, in the manner proved, against the city which caused it to be done, is a different and a distinct question from that which arises from the obstruction of the LaSalle street front, by the excavations in that street.

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IV.

1. The plaintiff owned or possessed a dock fronting on the Chicago River. "By the record (p. 17), it appears that the plaintiff had a ground lease from Timothy Wright, of the premises, with "dock and wharfing rights and privileges connected therewith," and was in possession thereof, and was occupying the same for the purposes of its business, and had been in possession and so occupying the same for over twenty-two years, and had erected thereon improvements necessary for its business, costing about $17,000. As the damage claimed was to the use while the plaintiff was so in possession under such a lease and occupancy. The plaintiff in law, so far as its right of action is concerned, is to be deemed and taken to be the owner, entitled to all the rights of action of an owner, for the particular injury proved to the use of the premises.

V.

The Chicago River is a navigable stream, a public navigable highway. (a.) It is made and declared so by the ordinance of 1787, and the several Acts of Congress admitting States into the Union: *Columbus Ins. Co.* v. *Curtenius*, 6 McLean, R. 212; *State of Penn.* v. *Wheeling Bridge Co.* 13 How. 518; *Jolly* v. *Terre Haute Bridge Co.* 6 McLean, 37; The Montello, 20 Wallace, R. 431.

(b) But aside from this, it is such by the test laid down by this court in the case of the Daniel Ball, 10, Wallace R. 563, in which case it is said: "The only test is that a river is to be deemed a public navigable river in law, which can be navigated in fact." The plaintiff has applied this test in its own business, at this very dock, for many years. This is the river out of which and through which the large commerce of the third city in the Union passes and repasses, passing this very dock, which is situated near the mouth of the river. The very boats of the plaintiff not only navigate this river, but carry passengers and freight to and from and past this very dock, through the entire chain of lakes, to Ogdensburg, thus connecting four States of the Union and Canada, and even across the ocean, thus forming a continued and connected highway for commerce, thus fully conforming to the definition given by Justice Davis in the case of the Montello, in which case he says:

"That those rivers must be regarded as public navigable rivers in law which are navigable in fact, and they are navigable in fact when they are used, or are susceptible of being used in their ordinary condition, as highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade or travel on water, and a river is a navigable water of the United States when it forms by itself, or by its connection with other waters, a continued highway over which commerce is or may be carried with other States or foreign countries, in the customary modes in which such commerce is conducted by water."

To the same effect is *Rowe* v. *Granite Bridge Company*, 21 Pick R. 347, decided by *C. J. Shaw*, and *Hickok* v. *Hine*, 23 Ohio State R. 523.

All such streams are public highways.

Or, in the language of the Court in *Railroad* v. *Schurmeir*, 7 Wallace, 272:

"All such streams should be"—speaking of navigable streams—"*should be deemed to be and remain public highways.*"

VI.

The Federal rule as laid down in some cases is that the plaintiff being possessed of a dock (fronting on the Chicago River—and it being a navigable stream—did not own or possess to the thread or center of the stream—as is the rule established by the State Courts—but this is immaterial, as it had in either event the right to construct docks, landings and wharves, and to the uninterrupted use of the same.

Yates v. *Milwaukee*, 10 Wallace, 503.
Railroad Co. v. *Schurmeir*, 7 Wallace, 272.
Avery v. *Fox*, 1 Abbott U. S. 246
Dutton v. *Strong*, 1 Black. 23.
Bowman et al v. *Wathen et al.* 2 McLean, 382.

In *Yates* v. *Milwaukee*, 10 Wallace R. 503, it is held these rights are property belonging to the riparian owner, and in determining whether they are such, and whether the riparian owner can be deprived of them except upon due compensation.

Miller, Justice, says, on page 503:

"As to the first of these propositions, whether Yates' title extended to the center or thread of the stream, it does not seem to be necessary to decide whether the title of the lot extends to the thread of the channel of the river, though, if the soil was originally part of the public lands of the United States, as seems probable, the case of the *Railroad Company* v. *Schurmeir* would limit the title to the margin of the stream."

VII.

Under the decisions of the State of Illinois—the plaintiff being in possession of property bounded by the Chicago River—became and was the owner of the water and soil to the center or thread of the stream.

City of Chicago v. *Laflin*, 49 Ill. R. 176.
Braxon et al. v. *Bresler*, 64 Ill. R. 488.
Ensminger v. *The People*, 47 Ill. R. 384.
Middleton v. *Pritchard*, 3 Scam. 510.
Canal Trustees v. *Havens*, 11 Ill. R. 554.
The Chicago & Pacific R. R. v. *Stein*, 75 Ill. R. 45.

In the case of the *City of Chicago* v. *Laflin*, the city of Chicago undertook to do acts which interfered with the dock rights of Laflin. In deciding the case the Illinois court held that Laflin owned to the middle or thread of the stream, and was entitled to the bed of the stream; and still further affirms this doctrine in the more recent cases cited above of *Braxon* v. *Bresler*, 64 Ill. R. 488; *Ensminger* v. *The People*, 47 Ill. R. 384; which cases not only hold the same doctrine, but go to the length that the public cannot use a dock erected by the riparian owner, or impede or interfere with access to his dock, without being guilty of trespass and liable to action. These cases we will have occasion again to refer to under another head of this brief.

The authorities in other States are very numerous, holding the same doctrine. Some of these will hereafter be cited.

VIII.

By the construction of the coffer-dam in the river, so as to interfere with the plaintiff's access to its dock—in the manner proved—the plaintiff has been deprived of its property by the city, and has suffered damages, and for such damages it is entitled to just compensation. This is so, first, under the decisions of the Supreme Court of the State of Illinois.

The Chicago & Pac. R. R. Co. v. *Stien*, 75 Ill. R. 45.

City of Chicago v. *Laflin*, 49 Ill. R. 177.
Braxon v. *Bresler*, 64 Ill. R. 492.
Ensminger v. *The People*, 47 Ill. R. 384.
Canal Trustees v. *Havens*, 11 Ill. 554.
People v. *City of St. Louis*, 5 Gilm. 351.
Middleton v. *Putchard*, 3 Scam. R. 510.

The case of the *City of Chicago* v. *Laflin* has already been referred to, as the case where the present defendant undertook to interfere with the riparian rights of Laflin, who had docks on this very Chicago River, not four blocks from the premises in controversy, and the Supreme Court held :

First. That Laflin owned to the thread or central line of the stream.

Second. That the city had no right to interfere with Laflin's enjoyment of the river, and

Thirdly. That the State could not delegate any such right or authority to the city to do so.

Fourthly. That the city, even if the State had delegated any such right, could not, nor could the State exercise such power without first making just compensation to Laflin.

Justice Walker uses this language : "And even if the State had delegated its rights to the city to change the channel of this stream, and we have been referred to no law which grants the power, it could exercise no higher or greater power than the State ; and we have seen that if the State exercises such power, and it injures the right of individuals, compensation must first be made. It would be monstrous that the city should at pleasure make changes in this stream so as to render buildings on the wharfs an obstruction, and then require their removal without compensation. Such power would be more vast and absolute than can be exercised by the State itself.

The city government is created, and has its powers delegated for the better protection of individual rights, and not that they may be disregarded or destroyed."

The doctrine of this case is fully endorsed in *Braxon* v. *Bresler*, 64 Ill. 488, where the plaintiff, the owner of the land adjoining Rock River, maintained an action of trespass against a wrong-doer for the taking rock and gravel from the bed of a navigable stream in front of land bounded by said stream. And in *Ensminger* v. *People of State of Illinois*, 47 Ill. 384, it was held that where a party interfered with or landed upon the dock of the riparian owner, the riparian owner could maintain trespass against the person so landing or trespassing.

In *Chicago & Pacific Railroad Co.* v. *Stein*, 75 Ill. R. 44, we have the direct question made in this case at bar, and it is decided in favor of the plaintiff by the highest court in the State of Illinois. This decision was rendered since the trial of this case in the Circuit Court. And if this action was pending in the State Court, this decision would settle fully that the instructions asked for by the plaintiff should have been given, and the plaintiff would have recovered.

"In the case of *The People* v. *The City of St. Louis*, 5 Gilm. 351, it was held that while the State possessed the power to change the current of the Mississippi River, or even stop up some of its confessedly navigable channels when necessary for the welfare of the State, *yet, if in doing this, private property should be damaged, compensation would first have to be made for that.*"

The same rule prevails (*b*) under the decisions of the Federal Courts, and by such decisions our eighth proposition is fully sustained.

Yates v. *Milwaukee*, 10 Wallace R. 504.
Avery v. *Fox*, 1 Abbott's R. 246.
City of Boston v. *Lecraw*, 17 Howard, 436.
Richardson v. *City of Boston*, 19 Howard, 270.

Same case, 24 Howard, 188.

State of Pennsylvania v. *Wheeling Bridge Co.*, 13 Howard R. 518.

Same case, 18 Howard R. 431.

Jolly v. *Terre Haute Bridge Co.*, 6 McLean, 237.

The Columbus Ins. Co. v. *Curtenius*, 6 McLean, 209.

City of Georgetown v. *Alexandria Canal Co.*, 12 Peters R. 98.

Bowman v. Wathen et al., 2 McLean R. 382.

In *Yates* v. *Milwaukee*, 10 Wallace, 504, the city undertook to and did interfere with the riparian rights of Yates, and it was held,

First. That the owner of land bounded by a navigable river has certain riparian rights, whether his title extend to the middle of the stream or not.

Second. Among these are free access to the navigable part of the stream, and the right to make a landing to and from his property.

Third. These rights are valuable, *and are property, and can be taken for the public good only when due compensation is made.*

The defendant in the case at bar for nearly a year has deprived the plaintiff of the right of access to this property—has made no just compensation; for such compensation or damages we sue in this case. This case is conclusive in favor of our right to recover, and no other or further citation beyond this is necessary. It will be noted that the rights of Yates were sought to be taken for public use. But they were not allowed to be taken until compensation was first made. We quote the following language from the opinion of Justice Miller: "This riparian right is property, and is valuable, and though it must be enjoyed in due subjection to the rights of the public, it cannot be arbitrarily or capriciously destroyed or impaired. *It is a right of which, once vested, the* *owner can only be deprived in accordance with established law, and if necessary that it be taken for the public good, upon due compensation.*" In *Avery* v. *Fox*, 1 Abbot's U. S. Reports, 246, decided by Withey, Judge, in 1868, when certain work was undertaken to be done in changing the outlet of White Lake, it was held,

First. That the outlet of White Lake is a navigable stream.

Second. That the owner of land bordering on a navigable stream in which the tide does not ebb or flow owns the land to the center thereof.

Third. That the government of a State may authorize alterations to be made in the width and course of a navigable stream. But before they can do so, they must make just compensation to the riparian owners. "If, thereby," we cite the language of Judge Withey, "a riparian owner is wholly or injuriously deprived of the use of its waters, which he is employing advantageously as an incident to his land, it is taking the private property of such owner in and to the use of that water for public use, and unless just compensation is made, is against both the principles of the common law and the provisions of the Constitution of the United States, and courts have no alternative but to so administer the law as to secure and protect such rights in a proper case."

The Judge, on page 250, further says: "This right of private persons to the use of water as it flows by or through their lands in any manner not inconsistent with the public easement, is as sacred as is the right of a person to his land, his house, or his personal property." See, also, *Richardson* v. *City of Boston*, *City of Georgetown* v. *Alexandria Canal Company*. These cases are referred to and commented under the next head.

In *Bowman et al.* v. *Wathen et al.*, 2d McLean, R. 382, Justice McLean, on this point, uses this language:

"On navigable streams the riparian right, we suppose, cannot extend generally beyond high-water mark. For certain purposes, such as the erection of wharfs and other structures, for the convenience of commerce, and which do not obstruct the navigation of the river, it may be exercised beyond this limit." The Court further held that the proprietor of a riparian right "has the right of fishery, of ferry, and every other right which is properly appurtenant to the soil, and he holds every one of these rights *by as sacred a tenure as he holds the land from which they emanate. The State cannot either directly or indirectly divest him of any one of these rights, except by a constitutional exercise of the power to appropriate private property for public use.*"

Under the head that the plaintiff has a right of action for the injury suffered, we shall cite further cases bearing upon this point, and re-refer to some of the above cases.

IX.

We say therefore, the plaintiff having suffered special damages by the acts of the defendant—in obstructing and preventing the loading and unloading of the steamers of the plaintiff's line to and from its dock, as proved, can maintain this action for such damages, and the Court below erred in deciding otherwise:

State of Penn. v. *Wheeling Bridge Co.* 18 Howard R. 430; same case, 13 Howard 518; *City of Boston* v. *Lecraw*, 17 Howard, 436; *Richardson* v. *City of Boston*, 19 Howard, 270; same case, 24 Howard, 190; *City of Georgetown* v. *Alexander Co.* 12 Peters, 98; *The Chicago & Pacific R. R.* v. *Stein*, 75 Ill. 45; *Rose* v. *Groves*, 5 Man & Granger, R. 612; *Baron* v. *The Mayor and City Council of Baltimore*, 2 Am. Jurist, 203; *Stetson* v. *Faxson*, 19 Pick. 158; *Brayton* v. *Fall River*, 113 Mass. R. 218; *Lyon* v. *Fish-*

monger Co. 10 Appeal cases, 679; *Clark* v. *Peckham*, 10 R. I. 35 to 38; *Rose* v. *Miles*, 4 M. & S. 101; *Clement* v. *Burns*, 43 N. H. 609; *Pierce* v. *Dart*, 7 Cowen, 611; *Davies* v. *City of Bangor*, 42 Maine, 522; *Rex* v. *Russell*, 6 East R. 427; *Hughes* v. *Heiser*, 1 Binn. R. 463; *Bacon* v. *Arthur*, 4 Watts, 437; *Harrison* v. *Sterett*, 4 H. & McH. 540, Angel on Highways, 567; *Haskell* v. *New Bedford*, 108 Mass. 208; *Bell* v. *Hull and Selby Railway Co.*, 6 Meeson and Welsby, 699; *The East and West India Dock and R. R.* v. *Gattke*, 15 Jurist, 261; *McCarty* v. *Metropolitan Board of Public Works*, Law Report, 7 Common Pleas, 508; same case on appeal to the House of Lords, Law Reports, 8 Common Pleas, 191.

Gerrish v. *Brown*, 51 Maine, 256.

Attorney General v. *Birmingham*, 4 Kay & Johnson, 528.

Enos v. *Hamilton*, 27 Wis. 256.

Hickok v. *Hine*, 25 3 Ohio State, 523.

Duke of Bucceleugh v. *Metropolitan Board of Public Works*, L. R. 5 H. L. 418.

Metropolitan Board of Public Works v. *McCarthy*, L. R. 7 H. L. 243.

Chamberlain v. *West End of London Railway Co.*, 2 B. & S. 605.

Ricket v. *Midland Railway Co.*, L. R. 2 H. L. 117.

Dobson v. *Blackmore*, 9 Q. B. 991.

The case of *The Chicago and Pacific Railroad Co.* v. *Stein*, 75 Ill. R. 43, is decidedly in point. It is a case where an action was brought by Stein against the railroad to recover for damages claimed to be sustained by him to his dock property, by reason of the construction of and maintenance by the railroad of a bridge and its abutments across the north branch of the Chicago River, which did not touch his property, which was bounded by the Chicago River; and by this bridge and embankment the approach by the river to his dock or river front was *impaired*, and the property thereby lessened in value. It was held by the Court, Stein could not only recover both for decreased facility in getting to and from his dock, and his dock property by the river, but for the decrease in the value of his property on account of its being rendered less approachable and useful as a dock or wharf by the abutments of the bridge. In deciding the case, Justice Craig uses this language, after quoting some Illinois cases: "From these authorities it is clear that appellees were the owners of the lots fronting upon the river to the center of the current, subject only to the right of the public to the free and undisturbed navigation of the river.

The State could not take or damage appellee's property, fronting upon or in the bed of the river, without first making compensation therefor, nor could it by granting a charter to appellant, authorize appellant to do what it could not in its sovereign capacity do itself.

If, therefore, appellee's property was taken or damaged by the erection of the bridge, a right of action exists in their favor. The damages for which they may however recover, must be special to their own property, and not such as are incident to, and shared by the public at large. * * * If the erection of the bridge was an injury or damage to the premises, permanent in its character, and not such as was shared by the public at large, then it was proper for the appellees to establish the fact that the value of the premises had decreased by the erection of the bridge.

We see no reason why it would not have been proper for appellees to have proved the value of their property before the erection of the bridge, and the value after the building of the bridge.

In other words, it would have been proper to have shown how much less the property would sell for in consequence of the erection of the bridge than if it had not been built: *Ottawa Gas Light Co.* v. *Graham*, 28 Ill. 73; *Ill. Cent. R. R. Co.* v. *Grabill*, 50 ib. 242."

In this case the jury and the Court below awarded damages; the judgment was reversed for two reasons—1st. That the evidence showing the injury Stien suffered by reason of his dock being rendered unapproachable, did not sustain the amount of the verdict. 2nd. Because the court below did not allow him to recover for the depreciation in the value of his property by reason of such obstruction. So that clearly under the law of Illinois the plaintiff can recover all the damages claimed by us in this case. This is the doctrine announced in the case of the *State of Penn.* v. *Wheeling & Belmont Bridge Co.*, 18 Howard R. 431, where Nelson, Justice, uses this language—"But although this right of navigation be a public right common to all, yet a private party sustaining special damage by the obstruction may—as has been held in this case, maintain an action at law against the party creating it to recover his damages. It was held in *Rose* v. *Groves*, (5 M. & G. R. 612), 3 Dowl Prac. cases, N. S.—61—that the owner of a wharf upon tide water creek cannot maintain an action for an illegal obstruction to the bank—this being common damage to all who use it—*but* for an obstruction adjoining the wharf which prevents vessels from lying at it in the accustomed manner—this being a particular damage, he can maintain an action. This decision is directly contrary to instructions of the Court below.

The case of *Baron* v. *The Mayor and City Council of Baltimore*, is commented on and fully approved in *Stetson* v. *Faxon* and *Stone* v. *Augusta*, and is directly in point. Baron owned a wharf in the harbor of Baltimore. The city authorities, acting within the scope of their authority, diverted certain streams of water from their natural channels, to a point near plaintiff's wharf, and thereby caused a great deposit of sand and earth to be carried down, so as to lessen the depth of water at the wharf, and materially to impair the rents and value of the wharf. The defense of the city of Baltimore was that it was a public corporation, acting within the scope of its authority, upon advice, with due care and circumspection, and what was done was necessary and beneficial to the city. The plaintiff was held entitled to recover, and recovered forty-seven hundred dollars for the injury to the rents and value of his wharf. Chief Justice Archer, in deciding the case, held that the plaintiffs were entitled to the profits of the depth of the navigable water which flowed up to their wharf, as well as the wharf itself, and that the city of Baltimore must make just compensation therefor to the plaintiffs. In speaking of this case, Putnam, Justice, in *Stetson* v. *Faxon*, uses this language: "The opinion of Archer, C. J., is very clear and able. It is founded on the immutable principles of justice and sound constitutional law."

In *Brayton* v. *City of Fall River*, 113 Mass. Reports, 218, which was an action brought by the plaintiff against the city for constructing its drains in such a way that their wash interfered with the use of plaintiff's dock, Morton, Judge, uses this language: "The defendant had the right to make these sewers or drains, and to discharge them into the sea, but this right is subject to some limitations. If the sewers or drains are so built or managed as to cause a public nuisance, the defendants are indictable; if a private nuisance is created they are answerable in damages to the persons injured." The Court then discusses the question as to whether the plaintiff had suffered special damage, and adds: "But in this case the evidence tended to show that the effect of the sewers had been to fill up the creek directly in front of and adjoining the plaintiff's wharf, so that his vessels which he was accustomed to employ to bring grain to his wharf and elevator, could not lie at the wharf on account of the diminished depth of the water. We are of opinion that this was an injury special and peculiar to him, for which he may maintain this action. He has a right to the water at his wharf at its natural depth; by the filling up of the creek this use of his wharf for the purposes for which it had been constructed and actually used, was impaired, and he was subject to an inconvenience which was not common to the public." We cite this case for three reasons.

1. It is directly in point.

2. It is decided by a court in a State in which the tendancy of its decisions "has been to restrict the right, to bring a private suit within narrower limits than seem to have been adopted in some of the English Cases."

3d. Because it is so recently decided, and by a court of such acknowledged authority.

Lyon v. *Fishmonger Company*, 10 Appeal Cases, 679.

In this case it was held, that the right to the exclusive access to particular land on the bank of a tidal river, is a private right to the enjoyment of the land, the invasion of which may form the ground for an action for damages. It is not necessary that the access should be entirely destroyed—this right of access is not held by the owner of the particular land in common with the rest of the public—for other members of the public have no access to or from the river, at the particular place, and it becomes a form of enjoyment of the land and of the river, in connection with the land, the disturbance of which is actionable.

The languge of Justice Melish, in deciding the case, is so pertinent, that we will cite two sentences: "A riparian proprietor above the ebb and flow of the tide, can bring an action against a person who diverts a half, or any substantial quantity, as well as if he diverted the whole; so a person entitled to a carriage-way or a footway can bring an action against a person who puts up a gate or stile where there was no gate or stile before, although such gate or stile may only cause a slight inconvenience in using the way. If a wharfinger has really a private right distinct from the public right of navigation to a free access from the river to his wharf, it seems to us that he could bring an action grounded on his private right against any one who rendered that access less convenient."

He then adds: "If this access to his wharf is less convenient, his right to bring action depends simply upon whether he suffers a particular damage." This case was decided in 1875. To the same effect and equally strong in the case of *The Duke of Buccleugh* v. *Metropolitan Board of Works*, Law Reports (English and Irish Appeals), vol. 5, page 451.

In *Clark* v. *Peckham*, 10 R. I. 35–38, which was an action brought to recover damages for an interference by the City of Providence with the dock front of the plaintiff. The court held, that if "the filling had caused any particular injury to the plaintiff he could recover;" as he did recover $9,000, and the law is thus clearly laid down, "that while the shore itself and the space between high and low water mark, is for public passage, the riparian owner has a right of access to the great highway of nations of which he cannot be deprived, is recognized by a great number of cases;" after citing which the Court adds, "And this riparian right is *valuable*, is property, and can only be taken on compensation: *Yates* v. *Milwaukee*, 10 Wallace, 497. So far as concerns the front of his land, the riparian owner has the undoubted right of access to it, and no one could do anything in front of his land to make it less accessible, without being liable for damages: *Richardson* v. *City of Boston*, 24 Howard, U. S. 188; *Harrison* v. *Sterret*, 4 H. R. & Mc H. 540."

The Court then says that if the obstruction was of such a nature and so placed as to prevent the access of any proprietor to his own land, then that would be a special damage to him for which he might sue, "and that although it might be a public nuisance to navigation, the plaintiff is entitled to claim for any special damage;" and he did claim and recover the above named sum: Also *Richardson* v. *City of Boston*, 19 Howard, 266.

In deciding this case, Justice Grier uses this language: "There was some evidence that the drain constructed by defendant was not carried out sufficiently to discharge its contents so as to be swept off by the tides, but that it caused an accumulation of matter at the outer end of plaintiff's wharves, insomuch that vessels could not approach them with the same depth of water as formerly. If this be so, it was an injury to the plaintiff, for which he was entitled to recover damages. This question should have been submitted to the jury, and this instruction given, as requested by plaintiff's counsel." If an action is maintainable for the accumulation of matter by a sewer at the outer end of plaintiff's wharves, so that plaintiff's vessels could not approach them, against the city which built the sewer under authority of law, it seems clear to us that plaintiff can recover for injuries resulting to it in the case at bar from the erection of the coffer-dam.

By reference to the same case, reported in 24 Howard, 188, it will be seen that after it was remanded the plaintiff struck out the counts for injury by accumulation of earth, and the case was tried on the issue as thus amended. But the doctrine as announced in 19 Howard, 266, is reaffirmed. See, also, on this point, *Clement* v. *Burns*, 43 N. H. 617. In this case, decided in 1862, it is said: "It must now be conceded as an established rule of American law, that the owner of lands adjacent to navigable waters has an interest in the shores *of which he cannot be deprived, even by the sovereign power without compensation.*" "And the cases are numerous where actions are maintained for the infringement of those rights;" and it further states that if he has no remedy, his interest is of no value; but it holds he has a remedy, by an action.

In the case of *City of Georgetown* v. *The Alexandria Canal Co.*, 12 Peters 95, where a private person filed a bill asking relief by way of prevention in case of a public nuisance, it was held that the plaintiff must aver and prove special injury to himself, and having failed to do so, he could not succeed; but it was held *if he had sustained special damage he could maintain a private action for such special damage from the erection of it*, "*because to that extent he has suffered beyond his portion of injury in common with the community at large*," and that he could have this remedy at law. The cases of

Price v. *Dart*, 7 Cowen, 610.
Hughes v. *Heiser*, 1 Binney, R. 463.
Rose v. *Miles*, 4 M. & S. R. 101,

undertake to and do furnish a general rule for recovery in this class of action. The case at bar is clearly within this rule. By this rule so laid down the right of recovery is given when the plaintiff suffers a special damage, as contra-distinguished from the public in general. It is held sufficient if the plaintiff "*was impeded in the act of navigation and incurred expense.*"

No one, we think, can read these decisions and others we might cite, without holding that the plaintiff can recover against the city its damages suffered by the obstruction of its river front, and that the Court below erred in holding otherwise; and inasmuch as its instructions were not in harmony with this law, the judgment must be reversed.

X.

We have argued this case this far as if what was done by the city in building the coffer-dam, had been authorized by the Legislature of the State. It will be seen that even if this was so, by the above cited authorities, that it would be no defense for the city, the Legislature having no authority to take, or authorize to be taken, plaintiff's property without just compensation.

The record is entirely silent as to what the Legislature authorized. We find the following law in force at the time: (See Laws and Ordinances of Chicago, 1873 Edition, page 538, section 33.)

"The Common Council shall have power to cause or authorize the building of one or more tunnels under the Chicago River and its branches, at the intersection of any street, or at such other points as, in their opinion, the public good may require, and the said city shall have power to purchase and hold all such real estate as may be necessary for constructing said tunnels and the approaches thereto; and in case of disagreement between the said city and the owners of any property which may be required for the purposes aforesaid as to the amount of compensation to be paid such owners, or in case such owner shall be an infant, a married woman, or insane, or absent from the State, the said city shall have the right to condemn said property, and the proceeding for the condemnation of such property shall conform to those specified or provided by the act above mentioned, in the case of the condemnation of land for a public street in said city, as far as the same are applicable."

Under this law, before the city could take plaintiff's property, or do it the damage it has done, it must make just compensation to plaintiff; and for that plaintiff sues, in this action, and under the authorities cited, is entitled to recover the same.

By an understanding, the Hon. R. P. Spalding, with whom we have the honor to be associated in this case, will discuss the other errors complained of in the record, in connection with the one argued by us. As the facts were undisputed, we thought the best presentation we could make of our views of the law, was to largely use the language of the Courts, in the cited cases. Letting them speak for us, this judgment must be reversed. All of which is respectfully submitted.

HORACE F. WAITE,

Counsel for Plaintiff in Error.

WAITE & CLARKE,

Att'ys for Plaintiff in Error.

IN THE

SUPREME COURT OF THE UNITED STATES,

No. 144.

OCTOBER TERM, A. D. 1878.

THE NORTHERN TRANSPORTATION COMPANY OF OHIO, *Plaintiff in Error,*
—vs.—
THE CITY OF CHICAGO,
Defendant in Error.

In Error to the Circuit Court of the United States for the Northern District of Illinois.

BRIEF OF DEFENDANT IN ERROR.

JOS. F. BONFIELD,
Counsel for Defendant.

CHICAGO:
PRESS OF BEACH, BARNARD & CO., LEGAL PRINTERS, NO. 104 RANDOLPH STREET.
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In Error to the Circuit Court of the United States for the Northern District of Illinois.

Brief of Defendant in Error.

MAY IT PLEASE THE COURT:

It is sufficient for the purposes of the City in this suit to state the propositions of fact which are admitted. The case turns on questions of law arising thereon. These propositions are:

1. The plaintiff is lessee of the owner of lot one (1) in block four (4) in the Original Town of Chicago, with the dock and wharfing rights and privileges, from April 1st, 1867, to April 1st, 1877.

2. The defendant commenced to build a tunnel under the Chicago river on LaSalle street about November 1st, 1869, and continued engaged in building the same until August, 1870.

3. Tbe Chicago river is navigable up to and beyond the premises as leased by plaintiff.

4. The work was pushed forward with reasonable vigor and dispatch, and the construction of the coffer dam was necessary to the progress and accomplishment of the work, and that the plaintiff could and did have access to its premises from the time of the commencement to the completion of the work, except from a portion of the river and LaSalle street fronts.

5. The map of the Original Town of Chicago was put in evidence. It appears that it was not acknowledged.

6. In the progress of the work the defendant did not come in physical contact with the lot of the plaintiff, or encroach thereon. The obstructions complained of were entirely in the river, and in the street.

I.

THE FEE OF LASALLE STREET IN FRONT OF THE PREMISES OF THE PLAINTIFF IS NOT IN PLAINTIFF, OR HIS LESSOR, BUT IN THE CITY OR STATE.

This land was granted by the United States to the State of Illinois, by virtue of an act entitled "An act to grant a "quantity of land to the State of Illinois for the purpose "of aiding in opening a canal to connect the waters of the "Illinois river with those of Lake Michigan," approved March 2, 1827.

The pertinent sections are as follows:

"Section 1. *Be it enacted, &c.:* That there be and

" hereby is granted to the State of Illinois, for the purpose
" of aiding the said State in opening a canal to unite the
" waters of the Illinois river with those of Lake Michigan,
" a quantity of land equal to one-half of five sections in
" width, on each side of said canal, and reserving each al-
" ternate section to the United States, to be selected by
" the Commissioner of the Land Office, under the direc-
" tion of the President of the United States, from one end
" of the said canal to the other; and the said lands shall
" be subject to the disposal of the legislature of the said
" State for the purpose aforesaid, and no other; *Provided*,
" That the said canal, when completed, shall be and for-
" ever remain a public highway for the use of the govern-
" ment of the United States, free from any toll or other
" charge whatever, for any property of the United States,
" or persons in their service passing through the same;
" *Provided*, That said canal shall be commenced within
" five years, and completed within twenty years, or the
" State shall be bound to pay to the United States the
" amount of any lands previously sold, and that the title
" to purchasers under the State shall be valid.

" Section 2. That as soon as the route of the said ca-
" nal shall be located and agreed on by the said State, it
" shall be the duty of the governor thereof, or such other
" person or persons as may have been or may hereafter
" be authorized to superintend the construction of said ca-
" nal, to examine and ascertain the particular sections to
" which the said State will be entitled under the provis-
" ions of this act, and report the same to the secretary of
" the treasury of the United States.

" Section 3. That the said State, under the authority
" of the legislature thereof, after the selection shall have
" been so made, shall have power to sell and convey the
" whole or any part of the said land, and to give a title in

"fee simple therefor to whomsoever shall purchase the "whole or any part thereof."

4 Stat. at Large, p. 234.

The conditions of this grant being complied with, the title became vested in the State, and the General Assembly from time to time enacted laws for the appointment of commissioners for the purpose of providing means for the construction of the canal, by the disposal at public sale of the lands so granted.

The first act for this purpose is entitled "An act to "provide for constructing the Illinois and Michigan Ca- "nal," and was approved and in force January 22, 1829. It provides for the appointment of commissioners, the selection by them in accordance with the act of Congress of the alternate sections of land granted, and for the sale by the commissioners of the lands when selected.

Private Laws 1829, p. 14.

The above act, and the several subsequent acts in reference to the same subject matter, authorize the subdivision of the lands into town lots by the commissioners.

See,

Act approved and in force Feb'y 15, 1831,
Private Laws 1831, p. 39.

Act approved and in force March 1, 1833,
Private Laws 1833, p. 113.

Act approved and in force Feb'y 10, 1835,
Private Laws 1835, p. 223.

Act approved and in force Jan'y 9, 1836,
Private Laws 1836, p. 145.

Act approved and in force March 2, 1837,
Private Laws 1837, p. 39.

It was under and by virtue of this act of March 2, 1837, that the plat of the original town of Chicago, introduced in evidence, was recorded. Section 7 of said act is as follows:

> "SECTION 7. The said Commissioners shall have pow-
> "er to cause surveys of such town sites as they may se-
> "lect, to be laid out by such person or persons as they
> "may think proper. The plats of such towns, certified
> "by such person or persons so employed, and said com-
> "missioners, shall be recorded in the recorder's office, in
> "the county where such town is situated; and such plat
> "so certified and recorded, or an attested copy thereof
> "shall be evidence in any court of law or equity in this
> "State, and plats of such town sites, subdivisions of sec-
> "tions or surveys, which have been made and certified by
> "the former commissioners, should also be recorded in the
> "same manner and have the same validity as aforesaid."

Upon sales being made by the commissioners as prescribed by the statute, certificates of purchase were issued, and upon the payment of the purchase money deeds were issued by the State.

The grant in this case is of the property described as lot one (1), in block four (4), in the original town of Chicago.

What is the effect of such a grant? Did it convey the fee of the street opposite the lot to the centre line of the street? The plaintiff in the court below in its second instruction ask the court to so instruct the jury. *The city claims that the grant was only of the fee of the premises within the letter of the instrument of conveyance, viz: the lot.*

Does the grant of a lot adjoining a public street, the fee of the street being in the grantor and there being no express reservation in the deed of the fee of the street, operate as a conveyance of the fee of the street *ad medium filum viæ?*

In *Gebhardt* v. *Reeves*, 75 Ill., 301, the court say:

"An easement may pass without express mention as an "incident to the grant of the adjacent premises; but there "can be no authority found either in reason or justice for "the proposition that the fee of one piece of land, not "mentioned in the deed passes as appurtenant to another "tract granted by an accurate description, giving it a definite and limited boundary."

There is a class of cases which hold that if land be described as bounded *by a highway*, or *along or upon a highway*, or *running to a highway*, the grant will be construed as a conveyance of the land to the centre line of the highway.

Thompson on Highways, 34.
Angell on Highways, 315.

The reason of the rule is well stated in *Canal Trustees* v. *Haven*, 11 Ill., 554. The court say:

"In such case the highway or river is regarded as the "boundary or monument, and the purchaser takes to the "middle of the monument as part and parcel of the grant."

To hold that the fee of land not described or mentioned in the grant passes as appurtenant to land which is accurately described, is simply to deprive the grantee of its estate "without due process of law." Construction is impossible in such a case, because there is no room for construction.

The rule is also laid down that where the descriptive words are "*by the side of*," or "*by the margin of*," or "*by the line of*" the highway, the fee of the highway is not included.

Angell on Highways, 315.
Thompson on Highways, 34.
Jackson v. *Hathaway*, 15 Johns., 447.
Sibley v. *Holden*, 10 Pick., 249.

And where a grant was made of land, the boundary lines of which were accurately described in feet and inches, but the land was described on certain streets, it was held that the fee in the streets did not pass by the conveyance.

Tyler v. *Hammond*, 11 Pick., 193.
O'Linda v. *Lathrop*, 21 Pick., 292.

It is clear then that the conveyance of this lot, as subdivided and platted, did not carry the fee to the middle of the street, *as part and parcel of the grant.* Nor could it have passed *as* appurtenant to the lot conveyed by the deed.

"Appurtenant is that which is used with, and related "to, or dependent upon, another thing more worthy, and "agreeing in its nature and quality with the thing whereto "it is appurtenant. It follows, that land cannot be appur-"tenant to land, for both are equally worthy in the esti-"mation of the law."

4 Greenleaf Cruise on Real Prop., 265, N. 1.
1 Coke upon Lyttleton, 121 b.

KENT, J., says: "It is competent for the owner of a "farm or lot to bound it by express terms, on the *side* or "*edge* of the highway, so as to rebut the presumption of "law, and thereby reserve to himself his latent fee in the "highway. He may convey the adjoining land without "the soil under the highway, or the soil under the high-"way without the adjoining land. If the soil under the "highway passes by a deed of the adjoining land, *it* "*passes as parcel of the land, and not as appurtenant.*"

3 Kent's Com., 424.
Jackson v. *Hathaway*, 15 Johns., 447.
Tyler v. *Hammond*, 11 Pick., 213.
Gebhardt v. *Reeves*, 75 Ills., 301.

It may then be assumed as clearly settled, that if the deed mentions the highway as a boundary, words of restriction are necessary, if it is intended to reserve the fee of the way, because without such words it would, by the ordinary rules of construction, pass to the center of the boundary or monument *as parcel of the grant.*

But if the highway is not mentioned, no restrictive words are necessary.

On the direct point that the fee of the street does not pass by the conveyance of the lot, see,

In the matter of Seventeenth St., 1 Wend., 262.
In the matter of Lewis St., 2 Ib., 472.
Livingston v. *Mayor*, 8 Ib., 85.
Wyman v. *Mayor*, 11 Ib., 487.
In the matter of Thirty-first St., 19 Ib., 128.

II.

THE CHICAGO RIVER, BEING A NAVIGABLE STREAM AND PUBLIC HIGHWAY, ITS SHORE AND THE SOIL UNDER ITS CHANNEL WAS NOT GRANTED BY THE CONSTITUTION TO THE UNITED STATES, BUT WAS RESERVED TO THE STATE. THE FEE WAS NEVER VESTED IN THE UNITED STATES.

By the ordinance of 1787 it was declared that " the " navigable waters leading into the Mississippi and St. " Lawrence, and the carrying places between the same, " shall be common highways and forever free."

In *Barney* v. *Keokuk*, 94 U. S., 338, this Court say:

" And since this Court in the case of the Genessee Chief, " 12 How., 443, has declared that the Great Lakes and " other navigable waters of the country above as well as " below the flow of the tide, are, in the strictest sense, " entitled to the denomination of navigable waters, and

" amenable to the admiralty jurisdiction, there seems to be " no sound reason for adhering to the old rule as to the " proprietorship of the beds and shores of such waters. It " properly belongs to the States by their inherent sover- " eignty, and the United States has wisely abstained from " extending (if it could extend) its survey and grants be- " yond the limits of high water."

Martin v. *Waddell*, 16 Peters, 367.
Pollard's Lessee v. *Hagan*, 3 How., 212.
Goodtitle v. *Kibbe*, 9 How., 471.
McCready v. *Virginia*, 94 U. S., 391.
Yates v. *Milwaukee*, 10 Wallace, 503.

It will no doubt in this Court, as in the court below, be contended that the Supreme Court of Illinois hold that the owner of this lot took with his grant the fee in the soil to the centre of the river. Upon a review of the decisions of the Supreme Court of Illinois it will be seen that this position is not sound.

In *Middleton* v. *Pritchard*, 3 Scam., 510, the Court hold that if the land *is bounded by a stream* not navigable, the rights of the riparian proprietor extend to the middle thread of the current.

In *Canal Trustees* v. *Haven*, 11 Ill., 554, the Court held that, by the common law, a grant of land bordering upon a highway or river carried the exclusive right and title in the highway or river to the centre thereof, subject to the right of passage in the public, *unless the terms of the grant clearly indicated an intention on the part of the grantor to confine the grantee to the edge or margin*, and that the purchaser of a town lot designated upon a recorded plat only acquires a title to the land included within the actual limits of the lot, as designated. He takes no interest in the highway except in common with the public, and cannot claim title to the centre of it.

In *Seaman* v. *Smith*, 24 Ill., 521, where one call was "to the lake, thence north following the line of the lake," the Court held "that the line at which the water usually "stands when free from disturbing causes, is the boundary "of land in a conveyance calling for the lake as a line."

In *Ensminger* v. *People*, 47 Ill., 384, the Court held that the line of the riparian owner of land in Illinois, *bounded by the Ohio river*, extends at least to low water mark. The controversy was about a strip of land lying between Levee street and the Ohio river.

In *City of Chicago* v. *Laflin*, 49 Ill., 172, the court held: "The rule is well settled that the title of a riparian owner "extends to the middle thread of the stream, *if it is called* "*for as a boundary*, and if he is the owner, subject, it is "true to the public easement."

The lot in controversy in this (Laflin) case was in a subdivision made by authority of the War Department of the United States in 1839. The lots were sold by the United States, and patents issued. The Chicago River was made the northern boundary of the lots fronting on the river. Mr. Burchard, the agent of the War Department, certifies on the map in explanation thereof: "The width of "the rear of the water lots bounded on the Chicago "River, is determined and established by posts set at the "intersection of the lines of the lots and streets with the "meanders of the river, as shown by the notes entered "upon the meandered lines." And therefore, from the record in the case, the court say: "In this case the "United States Government granted these lands *bounded* "*by the Chicago River, and made no reservation.* It therefore follows that the grantees became the owners of the "water and soil to the center or thread of the stream." The court seem to have overlooked the fact that the United States, not owning the fee in the soil to the center of the stream, could not convey it.

In *Braxton* v. *Bressler*, 64 Ill., 488, it appears that the north bank of Rock River *was one of the boundaries* of the plaintiff's land; and the court held that grants of land *bounded by rivers*, or upon their margins above tide water, carry the exclusive right and title of the grantee, unless the terms of the grant clearly denote the *intention to stop at the edge of the stream.*

In *Chicago & Pacific Railroad Co.* v. *Stein*, 75 Ill., 41, the reasoning of the court is on the assumption that the river was made *one of the boundaries of the lot*; but the court decide that the plaintiff could only recover for damages which were special to his property, and not such as were incidental, and shared by the public at large.

All the decisions therefore in this State turn on the material fact of whether the river was made a boundary, or not.

By the plat of the Original Town of Chicago, in which the lot in question is situated, the river was not one of the boundaries of the lot, but the lot conveyed was limited and fixed by a straight line on the LaSalle street and North Water street fronts. The dimensions of the lot in question were limited on all sides by lot lines. As I have already shown, the purchaser of such a lot does not take any special interest beyond its limits.

III.

Under the act of Congress of March 2, 1827, it was provided (Sec. 3) that after the selection should have been made, the State should have power to sell "the whole or "any part of said land, and to give a title in fee simple "therefor to whomsoever shall purchase the whole or any "part thereof."

By the act of January 22, 1829, (Session Laws Ills. 1829, p. 14,) commissioners were appointed to select the alternate sections; they (Sec. 7) were authorized to give notice and sell the said lands so granted by the General Government; by section 34 of the Act of February 10, 1835, (Private Laws Ills. 1835, p. 223,) the commissioners were instructed to examine the whole canal route and select such places thereon as should be eligible for town sites, and "they shall cause the canal lands in or near "Chicago, suitable therefor, to be laid off into town lots." It will be remembered that the State had no canal lands, except those granted by the General Government. The act of March 2, 1837, under which the subdivision and plat in question was made, authorized the commissioners appointed under it :

1. To "sell such parts of the canal lands" in the township in which Chicago is situated as may be necessary to produce a certain sum.

2. To make surveys of such town sites as they may select, and subdivide and plat the same.

It will therefore be observed that the State only authorized the commissioners to sell the lands *granted* by the *General Government, for canal purposes*, and designated as canal lands. The fee in the soil under the Chicago river, at this point, did not pass to the State under the grant from the General Government of March 2, 1827. It was never in the United States, but was in the State since its admission into the Union, in 1818. The several acts appointing and authorizing commissioners to sell the canal lands, only conferred the power to sell the lands granted by the General Government, and not any lands or property rights owned and enjoyed by the State theretofore. It is therefore demonstrated, from an examination of these acts, that the State did not intend in making sale of these river lots, to part with its fee in the highway, and that it conferred no authority on the commissioners who made the sales to do so, and that the commissioners, as shown by the plat itself, intended by their deeds to limit the conveyance to the land within the lot lines. There is no room for doubt as to the meaning of these acts and the power conferred upon the commissioners in disposing of these canal lands; but if there were, it is an established rule that where a grant is susceptible of two constructions, that should be adopted which is most favorable to the government.

Commonwealth v. *City of Roxbury*, 7 Gray, 451.
Martin v. *Waddell*, 15 Peters, 367.
Jackson v. *Reeves*, 3 Caines R., 296.

IV.

Under the laws of the State of Illinois, the effect of the acknowledgment and recording of a plat, in conformity with the statute, is to vest in the public the fee of the land marked and designated as a highway on the plat. This has ever been the policy of the State, and the laws providing for statutory dedications have uniformly been framed with this object.

Trustees v. *Haven*, 11 Ills., 554.
Hunter v. *Middleton*, 13 Ills., 50.
Manly v. *Gibson*, 13 Ills., 308.
Leech v. *Waugh*, 24 Ills., 228.
Stephens v. *Brown*, 40 Ills., 428.
I. B. & W. R. R. Co. v. *Hartley*, 67 Ills., 439.
St. John v. *Quitzow*, 72 Ills., 334.
Gebhardt v. *Reeves*, 75 Ills., 301.

The laying off of a street on a plat, dividing it from the lots by continuous lines, and acknowledging and recording it as required by the statute, if made by a private person, passes the fee to the State or city; so the plat made by the canal commissioners, of the lots in the original town, dividing the lots by straight and continuous lines, from the highways shown therein, is conclusive of the intention of the State to preserve the fee in the streets and in the bed of the stream, in the State, the same as if the subdivision were made by private parties.

V.

SINCE THE WRIT OF ERROR WAS PERFECTED IN THIS CASE THE SUPREME COURT OF THE STATE OF ILLINOIS HAVE DECIDED, THAT THE DEFENDANT HEREIN IS NOT LIABLE IN DAMAGES TO ABUTTING LOT OWNERS ON LA SALLE STREET, BY REASON OF THE CONSTRUCTION OF THE LA SALLE STREET TUNNEL.

The case is entitled *The City of Chicago* v. *Julian S. Rumsey*. The opinion of the court was filed June 21st, last, and is reported in the 10th Legal News, p. 333. It was one of the numerous cases begun against the City by reason of the construction of the La Salle street and other tunnels by the corporation. The case is decisive, as far as the rule in the State of Illinois governs, of the doctrine sought to be sustained by the City in this suit. The court decide that the act of the legislature in directing the subdivision of canal lands in Chicago into town lots, and the laying out of streets and alleys, operated either as a sufficient dedication of the fee of the streets and alleys to the City, or as a declaration of reservation in the State.

" We are satisfied," says the court, " that the fee of La

" Salle street, adjacent to Rumsey's property, is either in " the State or the City of Chicago, for the use of the public, and therefore, Rumsey can have no legal interest in " it, except in common with the public." The court discuss the effect of the Act of Congress, donating the land to the State for canal purposes, and the legislative acts authorizing the sales thereof, and decide that it was the *policy* of the State to vest the fee of streets in cities, etc., so that it should be under the paramount control of the legislature " for the public use, divested of all claims of " private ownership. This being the declared policy of " the State, the presumption would follow, that no discrimination, in this regard, should exist between cities, towns, " etc., laid out by the State, and those laid out by other " proprietors, and it would require clear and satisfactory " proof that the State intended to vest a private ownership in the soil under the streets, in the cities and towns, " laid out by it, to induce in us the belief that it was actually designed to accomplish that result. A general " policy being once established, it devolves upon those " claiming exemptions to clearly show their existence. * " * * *The commissioners had no authority given them by* " *the law to sell anything but lots, where towns were laid out* " *and the patent issued by the Governor could only include* " *what the Commissioners sold.*"

The court further hold, that the 13th section of Art. 2, of the Constitution of 1870, which provides that " private " property shall not be taken or damaged for public use, " without just compensation," is not retroactive. The provision can have no application to this case.

I think this decision, as far as it is accepted as an authority in this court, is conclusive in favor of the City upon all the points presented in this record.

VI.

The plaintiff proved that it was the lessee of the owner of lot one (1), in Block four (4), in the original town of Chicago, "with the dock and wharfing rights and privileges." (Record, p. 17.)

The case is argued by the counsel on the theory that the plaintiff is a riparian owner, and that lot one (1), block four (4), original town, had its southern boundary on the Chicago river.

On this assumption of counsel I have to this point directed my argument, but their assumption is not true. The plat of the original town of Chicago was introduced in evidence for the purpose particularly of showing defective acknowledgments and certificates.

The following is a section of this plat:

It will be observed that lot one (1), block four (4), is bounded on the south by North Water street, and not by the Chicago river, as is erroneously assumed. But the record shows also, it is but proper to say, and it is in evidence that the plaintiff is not only the owner of the lot in question, but is the owner of said lot, "with the dock and "wharfing rights and privileges." Now what were these dock and wharfing rights and privileges? We cannot presume that they are the rights which follow a riparian owner either to the margin or middle of the stream, because the premises was not laid out as a water lot, a street being laid out and platted between it and the river. From the record these "dock and wharfing rights "and privileges," must be construed as certain rights of occupancy, and uses granted by the city or other authority entirely inconsistent with the claim of plaintiff, and the theory upon which this suit was brought.

The bill of exceptions, however, in this case is remarkable more for what it conceals, than for what it reveals—for what it assumes, than for what it states. Counsel for plaintiff have deemed it necessary in their brief to introduce, and argue from an ordinance confessedly not in the record, but to which I interpose no objection, understanding that both sides desire the decision of this court on the merits of the suit in the light of all undisputed material facts whether set forth explicitly in the bill of exceptions or not.

There is quite a history connected with the water privileges upon that part of the Chicago river, in the original town. It will be noted on the plat that the south line of North Water street was the northern boundary of the river. By accretions in time more land than the ordinary width of the streets was made, which were in some instances occupied by squatters, and claimed by the city, and the owners of the lots fronting on North and South Water streets. The legislature of Illinois, February 27, 1847, and again February 11th, 1853, by suitable acts, authorized the city to adjust and settle these supposed conflicting interests and rights. Under this power the accretions were surveyed, and after reserving the proper width of the street (80 feet,) a plat was made and recorded of these water lots or wharfing privilege, between North and South Water streets and the river. This plat was recorded in 1848, and shows the lots laid out as follows:

Along the line of South Water street, by an arrangement with the city, the lot owners, on terms proposed by the city, and which were based on a concession that such owners had rights as purchasers superior to strangers, became the purchasers of these water privilege lots. In all the conveyances the following condition was incorporated:

> " Subject, nevertheless, to the condition that five feet in " width, extending the whole length of the front of said " premises on the river, shall forever remain an open wharf " or dock, to be built and maintained in good order and " repair by said party of the second part, his heirs and as-" signs, for the free passage of persons on foot, and that, in " no case, shall passengers by water be subject to any " charge whatever for landing their ordinary traveling " baggage and carrying the same over said wharf; and " that the top of said wharf shall be at all times properly " and safely planked or covered, so as to afford a secure " passage for such passenger and baggage."

The owners of the property fronting on North Water street did not purchase the wharfing lots laid between North Water street and the river. They petitioned for the vacation of the street and the widening of the river, and asked that a dock line be established. The river was widened under proper ordinances of the city, and the dock line established along about the middle of said North Water street, as appears by the following diagram and plat, showing the lot in question, with its dock and water privileges, to wit, that part of old North Water street not taken as part of the bed of the Chicago river, and which was purchased by the original owners of lot one, in the same manner and under the same conditions as the water privileges along South Water street, except that ten instead of five feet was reserved along the river.

The language of the ordinance authorizing the conveyance of that portion of the street not taken as part of the river, is as follows:

" Ten feet next adjoining the river, of said vacated premises, shall be and always remain an open wharf, upon the " same conditions and restrictions as contained in the settlement of the wharfing privileges on the South side of " the Chicago river."

It is, in view of the facts, difficult to perceive what special right the plaintiff has to the bed of this stream.

VII.

It appears, then, that the legal title to the bed of the river was in the State, and not in the adjacent lot owner, and that the plaintiff, having no special interest, is not entitled to special damages. The plaintiff having no title from the State, acquired in the soil of the river and its banks no *jus privatum*, and none of the riparian rights arising therefrom.

" On the general question as to the rights of the public " in a city street, we cannot see any material difference in " principle with regard to the extent of these rights, " whether the fee is in the public or the adjacent land " owner, or in some third person. In either case the street " is legally open and free for the public passage, and for " such other public uses as are necessary in a city, and do " not prevent its use as a thoroughfare, such as the laying " of water pipes, gas pipes, and the like; and according " to the laws of Iowa (which must be taken to govern this " case), it may be occupied by these improved iron ways " for public passage, which modern skill has devised, and " which the advance of general improvement requires."

Barney v. *Keokuk*, 94 U. S., 324.

For the accommodation of the great public of Chicago, it became necessary to erect this tunnel. The work was done with all the care and dispatch which the best engineering skill could devise. It was wholly done upon the street, or upon the river, and did not touch the property of plaintiff. The coffer dam was entirely in the stream, and did not impede navigation as much as the laying of water or gas pipes in the street would the traffic thereon. It was a temporary use of the public highway made necessary in the construction of a great public improvement, and the record and facts fail to show that plaintiff had any special rights to entitle him to special damages.

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